United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

B

United States Court of Appeals

For the Second Circuit

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

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EXCERPTS FROM THE DEPOSITION OF EDWIN H. MORRIS
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and BROADCAST MUSIC, INC., et al.,

Defendants.

----------x

August 30, 1972
10:30 a.m.

Deposition of defendant Edwin H. Morris & Co. by EDWIN H. MORRIS, taken by plaintiff pursuant to notice at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, N. Y., before Richard Kaufman, a Certified Shorthand Reporter and Notary Public of the State of New York.

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Attorneys for defendant G. Schirmer
110 East 59th Street,
New York, N. Y.
BY: MARY DRUGAN, ESQ., of counsel.

- - -

EDWIN H. MORRIS, called as a witness, being first duly sworn by the notary public, testified as follows:

EXAMINATION BY

MR. HRUSKA:

Q Would you state your address for the record, Mr. Morris?

A 31 West 54th Street, New York City.

Q What is your present job?

A I am president of the Edwin H. Morris Company and its affiliated companies.

Q Do you have an equity interest in Edwin H. Morris & Company and its affiliated companies?

A Yes, I do.

Q 100 per cent?

A The principal companies, Edwin H. Morris & Company, Mayfair Music, Melrose, are wholly owned subsidiaries of which I am the major stockholder.

Q 51 per cent or more?

A 70 or more.

Q Are there any other significant stockholders?

A In the corporation?

***

***

Brothers.

Q In what capacity?

A I was associated with the theater department for a brief time and when they acquired Witmark, I was transferred in there as the contact between the Witmarks and Warner Brothers.

Q Was your job at Warner Brothers that of a music publishing job?

A Not at all.

Q So you became the operating head of Witmark in 1929 or thereabouts?

A That is right.

Q Could you trace your career from that point up to the present?

A In the following year, Warner acquired the Harms Music Company, DaSilva, Brown and Henderson; the Remick Music Corporation, New World Corporation and a number of their small subsidiaries related to writers of some reputation such as T. B. Harms, Jerome Kerns. The others I don't remember.

Q And you became the operating head?

A No. At that time Herman Starr who was brought in to head the entire operation and also

was involved in the Brunswick Radio acquisition plus industrial films, so he was the head of the overall operation. Max Dreyfus, the head of the combined companies that they had bought was more or less the music head. That lasted for approximately a year and a half at which time Mr. Starr was replaced -- he wasn't replaced, he was transferred to another area of operation and Max Dreyfus had submitted his resignation on retirement.

I was then placed in charge of the entire operation. That lasted until 1935, '36 when Warner withdrew their repertoire from ASCAP and I operated the music companies but had nothing to do with the negotiations that they had with broadcasters. That period lasted approximately nine months.

I then returned to my physical capacity as head of the operation until my resignation in 1939.

Q Do I understand correctly there was a nine-month period only in which Warner Brothers had removed its repertoire from ASCAP?

A I am committing that to memory, but I believe they returned to ASCAP in September or

My only function then was to introduce Starr to these people and be an observer. He presented the arguments.

Q What was the reaction of the writers to the Warner Brothers withdrawal?

A Completely antagonistic, in every area. Even those writers I have not mentioned that were currently employed by Warner through me on the coast in the motion picture division were rather violent.

Q Do you remember any specific points they made?

A There were a number of pictures in production and there was no way of exploiting these pictures other than through the medium that broadcasting offered. In those days the record business was practically nonexistent from the standpoint of reaching the public. So, your one medium that really had impact was through exploitation. So, the writers were very bitter. Cole Porter in particular with a show called Jubilee which opened in Boston at that time and had one very famous composition which later became Begin the Beguine, was highly incensed.

Q Do you remember any other points that the writers made here?

A They constantly appealed to me to see if I could do anything and I was helpless because the die had been cast and this is the way they were going. Mr. Warner himself was the one that decided this with Mr. Starr which direction they were going, and I was trying to do something for them with product that was being released and the atudio also felt the medium of exploitation was being denied to them.

Q Was there any expression by the writers as to the loyalty to ASCAP?

A Yes.

Q And the move by Warners was really an act of disloyalty.

A Yes.

Q During this period, did Warner Brothers make some effort to license broadcasters to the performance rights in the Warner Brothers repertoire?

A Yes.

Q Do you remember what was done ?

A Starr had some men working for him in the field who contacted various broadcasters. They

did obtain some license. I don't know to what extent. I would say a rather small group.

Q Was any effort made to license the radio networks?

A I don't know if they had any meetings. To my knowledge, I didn't know what was taking place.

Q Did Warner Brothers hire additional people to attempt to sell performance rights to radio stations?

A As I recall, Starr recruited some of the members of Warners own organization. They had field men of course who were selling in various areas.

Q Selling sheet music?

A I am talking about the picture business itself. Our people had nothing to do with any of this.

Q In other words, the publishing company recruited additional personnel from the motion picture arm?

A Mr. Starr recuirted people. As far as the financial arrangements, I don't know. I remember they were on my payroll.

Q These were additional people brought into the operation?

A They did recruit a couple of people in our organization who had experience in copyright. They were the only ones I remember. One name in particular, Victor Blau.

Q I am having a little difficulty following the company lines on this. If you can sense my difficulty, maybe you could straighten me out.

Was there a separate part of Warner Brothers or separate subsidiary formed for the purpose of licensing performance rights?

A Not that I know of, no.

Q I had gotten the impression before there was one music publishing arm of Warner Brothers with perhaps a number of subsidiaries like these companies that were part of Warner Brothers such as the T. B. Harms, etc., under that arm.

What was the name of that publishing arm of Warner Brothers?

A Music Publishers Holding Corporation.

Q The name Warner Brothers was not part of the company name?

A No.

Q And that was a separate subsidiary of Warner Brothers?

A That is correct.

Q You were the operting head of that subsidiary?

A That is correct.

Q And there was somebody else in charge of licensing performance rights?

A That is correct.

Q Was that somebody else -- that was Herman Starr?

A Yes.

Q Was he under you in the line of organization?

A No. I had no relationship in that at all. Mine was strictly a publisher's function. I was divested of any so-called authority in the area in which he was operating. That was purely between Harry Warner, the president, and Herman Starr.

Q He was an employee, Starr was, of --

A Warner Brothers.

Q Not of the publishing?

A That is right.

Q Not of the holding company?

A That is right.

Q Basically, as far as you can recall, the employees who performed the job of licensing performance rights, or soliciting broadcasters for performance rights licenses, were not employees of MPHC, but were employees of Warner Brothers?

A That is right.

Q The writers were concerned that MPHC or Warner Brothers would not do as effective a job in licensing broadcasters as ASCAP had been doing; is that true?

A That is true.

Q Do you feel they gave the system a fair time to prove itself?

MR. BLUMSTEIN: Can I have that question back again?

(Question read)

MR. BLUMSTEIN: When you say "they" the writers?

MR. HRUSKA: Yes.

MR. BLUMSTEIN: I will object to the form of the question.

You can answer, if you can.

A In my opinion, it was quite obvious after the first two or three months that the Warner plan could not possibly succeed inasmuch as it was obvious fromthe way the broadcaster conducted their affairs, that they were not in any precarious position so far as their operation and the writers constantly appealed to various members of Warner Brothers to call it off.

The success of licensing, as I mentioned before, was not successful to any extent.

Q During this nine-month period?

A That is right.

Q You don't remember how many licenses?

A I would say a very small number, and mostly obscure, nothing of importance as I remember.

Q Was the Max Dreyfus you referred to before as having been associated with Warner Brothers, the same Max Dreyfus that became associated with Chappell?

A That is correct.

Q Do you know when Max Dreyfus became associated with Chappell?

A In 1936.

Q Who within your organization at the time was the prime mover for the decision to with draw the Warner Brothers repertoire from ASCAP?

A I must say Herman Starr was the one that convinced Warners of the move.

Q Do you remember his reasons?

A He didn't feel that ASCAP was performing the function that would give the Warner group enough money and he felt because of the strength of the writers and the catalog could obtain a better deal.

Q Did Mr. Starr continue to believe that through this hiatus period?

A As far as I was concerned, he was highly confident all the way.

Q Did Mr. Starr remain with the company after this nine-month period, after the decision had been made to return to ASCAP?

A Yes, he did.

Q For how long?

A Until his recent demise which I think was three years ago. I don't remember how long ago it was. He was always with Warners.

Q Okay, we are up to 1936 in your career -

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MR. HRUSKA: Yes.

Q How was that finally settled?

A I don't know the details of that. I just know that it was settled.

Q ASCAP came down in its demands for a higher price?

A I presume there was a meeting of the minds of the committees that were involved. As to what the terms were at that time, I didn't know.

Q During this period of the strike, did you solicit any of the broadcasters to see if you could get them to take performance rights licenses to your music?

A No.

Q Why not?

A I was an ASCAP publisher and I had no where to go. All I did during that period was believe it was possible thateventually this thing would be settled and I acquired a few small companies to more or less bolster what I started with, but I had no contact with anyone in any area of broadcasting.

Q Did you have the feeling it would have been disloyal to ASCAP during this period to

break the line, as it were, and solicit the broadcasters?

MR. BLUMSTEIN: I will object to the form of that question.

You can answer.

A I don't believe the question of loyalty enters into it. It was just that that was the one area understood and knew, ASCAP, and I just felt I had to sit it out and wait until things were resolved.

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Q You think it was in the best interest of your company to have the broadcasters deal with ASCAP rather than with the Edwin H. Morris Company directly?

MR. BLUMSTEIN: Object to the form of that question, too.

You may answer.

A I believe that any negotiations would be better handled with an organization rather than me as an independent.

Q Why?

A His story had proven to me they didn't need me. I can only go by my experience what had happened back in '35, '36. A small operation like mine was of no importance to anyone.

Q The broadcasters were using public domain music at the time, weren't they?

A Yes.

Q Didn't you think some broadcasters might have been interested in using your repertoire?

A I didn't know them. I had no contacts.

Q What writers did you have at that time?

A Actually I didn't have any writers under contract. Johnny Mercer, about that time, had

returned to California as an independent and I had a number of traffic writers, so to speak that were coming in and it so happened I had a couple of songs that were doing quite well when this happened, but they were not contract writers. My firm was too young to be in that position to subsidize or have writers of any importance.

Q Suppose there was a music strike today, the same thing that happened in the early 1940s, would you solicit any broadcasters today in an effort to get them to take performance rights licenses to musical compositions in your repertoire?

MR. BLUMSTEIN: What do you mean by music strike? How did it come about?

Q Let us assume the broadcasters all cancelled their ASCAP licenses and they refused to deal with ASCAP.

Would you solicit any braodcasters for direct licenses?

A I can only put it the other way. Would they solicit me?

Q Let us assume they did.

A I would have to listen to the proposition.

Q But you wouldn't go to them?

A No.

Q Why not?

A Because I don't believe I have any strength in that area. I don't think there would be any reason for me to do it.

Q You would be in a position where you weren't getting any performance rights royalties because they weren't using your music and if you were successful in getting broadcasters to take direct licenses to your music, you would be getting some revenues.

Why wouldn't you try to get them to take direct licenses?

A I don't believe that would be the direction I would be inclined to go.

Q Why not?

A Simply because I believe that the organization of ASCAP best represents the interests of the writer and myself.

Q And you would like to see the broadcasters return to ASCAP rather than go the route of bypassing ASCAP, getting direct licenses?

A For one, I don't believe I can afford what would be entailed in that kind of dealing because

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give you all the details you want and we will do it on a sheet and send you the sheet at the end of each quarter and we will send you a check for what we used pursuant to the deal we made and you trust us.

Does that strike you as a sensible position, one you would be likely to accept?

A I would have to have the proposition before I can evaluate it.

Q What other facts would you like to know?

A I assume it is a matter of economics to some extent.

Q Let me make it easier. Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?

A No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possible entertain anything of that kind.

Q The money would be the same. I am having difficulty understanding that.

A The very structure of what I believe would no longer, to me, exist, so I can't see that.

Q I guess what I am really asking you, Mr.

Morris, is, what is the structure of what you believe?

A I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.

Q So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?

A I believe that would be the end of the road for me as a publisher.

Q Do you think other publishers feel that way, other ASCAP publishers?

A I don't know what other publishers feel. That you will have to ask for yourself.

Q We will.

MR. BLUMSTEIN: Can we take a few minutes?

(Recess.)

BY MR. HRUSKA:

Q I guess we were up to the point at which the music strike, what we have been referring to loosely as the music strike, was settled.

Can you continue the tracing of your career

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have not entered into contracts?

A No.

Q Do you get exclusive publishing rights with respect to particular compositions or are there any situations in which you plus one or more other publishers would have publishing rights with respect to a particular composition?

A Yes. There are two categories. Sometimes a song is brought to us that already has an obligation with another and we have a joint publication, or we administer. This is not done often, but there have been cases of that kind.

Q Are you familiar with the AGAC form of publisher-writer contract?

A Yes, we use it.

Q Exclusively or generally?

A I would say generally, the largest percentage of our contracts are that form.

Q This would be true of all the three categories of writers that you mentioned.

A If the writers are members, obviously that contract is used, and we find that a good deal of the traffic we have were our members, occasionally we will have writers where that form is not used, but the terms of the contract, I will say this, are

virtually the same.

Q Would that be true specifically with respect to the AGAC provision on requiring the consent of writers to the issuance of certain types of direct licenses by publishers?

MR. BLUMSTEIN: Could I have that reread?

(Record read.)

MR. HRUSKA: Let me reword that question.

Q Do all or most of your contracts with writers which are on forms other than the precise AGAC form, require you, as publisher, to obtain the consent of the writer before issuing direct licenses to the writers music?

A What specifically are you referring to?

Q Well, the AGAC contract has a couple of provisions for J, K, and L; J, K, and L, which relate to the obligation of the publisher to obtain the writer's consent before issuing a direct license to various categories of users or in respect of various types of uses.

A So as far as we are concerned, I do not believe the other form of contract we use would include that paragraph.

Q But you are not sure?

A No, I am not.

As to L&M, unless I check my records, I would not attempt to give an answer to that.

Q Could you give an answer, to the effect of the concept, are these non-AGAC agreements you have with certain writers, agreements which impose upon you as a publisher some obligation to obtain writer consent before the issuance of direct licenses or any type of direct licenses?

A I believe I would be correct in saying that all the restrictions that apply here would not apply in that form.

However, there is an obligation on our part to publish and exploit. These are basic in the contract. I can't expand on that without reading, but those I know are primary requirements of the writer when we negotiate.

Q But you don't recall specifically how these non-AGAC contracts handle the matter of consent, writer consent?

A No, I am not certain of that.

MR. HRUSKA: In light of that answer, would you wish, Mr. Blumstein to reconsider the question of producing these forms of writer-publisher agreements?

MR. BLUMSTEIN: No, I will not reconsider my position in terms of producing the entire agreements. I think as I said before, I think there is no problem about producing provisions in those agreements which relate to the specific subjects you have been asking about, and if you ask me if we will produce those provisions in excerpted form, the answer is, well, we will.

MR. HRUSKA: You would undertake to go through all the contracts and produce all the variations on that type of provision?

MR. BLUMSTEIN: That is a good question, because I don't know how many contracts there are.

MR. HRUSKA: That is why I think it would be so much simpler to produce the contracts and let us do that work for you.

MR. BLUMSTEIN: I think the best thing to do on that --

MR. HRUSKA: -- is hold it for your objections.

MR. BLUMSTEIN: No, until I have had a chance to confer with Mr. Morris and find out what the nature of the task may be.

Q Did you tell us that most of the writers with whom you have agreements were AGAC members?

A Yes.

Q Here is a question or series of questions I asked Mr. Brettler and I would kind of like to put the same questions to you to see if there is any difference in the operations, and the way I did this with him was to suppose that a new writer who has just gotten off the ground, so to speak, but had severed relationships with any prior publishers that he had dealt with, came to you with say four or five new songs which you thought were commercially exploitable.

Could you give us an idea of the steps that you would go through with that man and that music so as commercially to exploit that music?

I take it you would start with a contract?

A The contract generally would ask for an advance. I mean he would ask for an advance, for either single composition or as you say four or five. This is a matter of negotiation.

Q That would be advance against royalties?

A Yes. The form of contract will depend upon whether we agreed on the form. He may not be a member of this organization.

Q Of AGAC?

A Yes, but he may want that form. I have no

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MR. HRUSKA: You are not assuring us if we give you a protective order that you will give us the information?

MR. BLUMSTEIN: First of all, I think you probably already have it or you can get it easily from ASCAP.

MR. HRUSKA: I don't know that you can break it out from those reports.

MR. BLUMSTEIN: Let's talk about it when we get finished here.

MR. HRUSKA: All right.

BY MR. HRUSKA:

Q Were you ever approached by any representative of the Minnesota Manufacturing & Mining Company which we shall call 3M, with respect to the possibility of your granting 3M a performance rights license to one or more musical compositions in your repertoire?

A We were approached by 3M a number of years ago.

Q Do you remember when that happened? Does 1964 ring any bells?

A It's a number of years ago. I don't recall.

Q Who approached you?

A I was not approached by the person. He approached my office and my staff, or my comptroller who relayed the information to me.

Q That is Mr. Gerson?

A Yes.

Q Mr. Gerson talked to you about the approach that had been made to him?

A That is correct.

Q What did he tell you?

A We didn't do any business because we didn't want to.

Q Why not?

A I had heard they had been doing business with some of the publishers and while it was more or less street talk, I had no conversations with the other publishers and I didn't respond to what they had suggested to Gerson. Of course now it's from memory, I can't remember what it was, but it wasn't anything that appealed to me. It was very small, as I remember.

Q What was very small?

A The amount of money involved. It didn't interest us.

Q Are you sure that the 3M representative had quoted specific terms to Mr. Gerson?

A I believe so. In memory, I would say that Mr. Gerson discussed it with me and our decision was not to proceed.

Q Were there any further discussions with 3M after that initial approach to Mr. Gerson?

A No.

Q In other words, you responded back to 3M, we have no interest, we don't want to discuss it any more?

A That is correct.

Q As a result of that, the Edwin H. Morris Company did not receive any royalties from 3M on the 3M -- in connection with the sale of the 3M tapes; is that right?

A That is right.

Q And you thought that situation was better than receiving some royalties from 3M?

A The amount involved didn't interest us.

Q But you don't remember what the amount was?

A No. If it had been important, I would have remembered it.

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cover any expenses associated with the licensing of 3M?

A Who does business that way?

Q You expected --

A I am not in business to cover expenses. I didn't think their offer was worthwhile.

Q But you expected the offer would yield more money to your company than the expenses of the licensing?

A I don't follow that.

Q It would have been a profit making transaction had you entered into it?

A When you are dealing in pennies, that is not much of a profit.

Q Were you dealing in pennies?

A As I remember, there was small money involved.

Q Pennies?

A When I say pennies, that is a term. It certainly didn't involve any money. It seemed to me that the sole purpose of the people that did business was exposure of their material and that was not something that I was interested in.

Q Do you recall if there was an offer by 3M of a minimum number of Morris compositions to

be included on the 3M tape?

A I don't recall but I presumed that would have been one of their offers.

Q Do you remember the name of the 3M representative who approached Mr. Gerson?

A No.

Q Would Allen Arrow --

A Allen Arrow I have met. I don't know whether it would have been Allen Arrow or somebody directly from Minnesota Mining. I don't know. I had no contact with him myself.

Q Do you recall whether the offer of a guarantee by 3M to the Morris Company was a part of the discussions --

A To do what?

Q Do you recall whether 3M had offered to guarantee Morris Company a certain amount of money?

A I have no recollection.

Q Did you ever attend an ASCAP board meeting at which it was announced that Shapiro, Bernstein and Leeds had given direct licenses to 3M?

A I heard about it. I don't remember being present at that particular meeting.

Q What did you hear about it?

A I have just heard that they had made a deal.

Q Did you hear of any reaction of people at that meeting to the announcement of such a deal?

A No, I didn't.

Q What was your reaction to it?

A My reaction, they were free agents. They were entitled to do as they pleased. I just didn't see it the same way they did.

Q Suppose 3M approached you today and offered you a guarantee of $50,000 for the use of 30 Morris compositions in a new series of tape. Would you discuss that prospect with them?

A Of course.

Q If the guarantee were 10,000, you wouldn't?

A This is in the realm of fantasy. Let us talk about what is practical. You give me from 50 to 10, what do you expect me to say? 50 and 10 are quite different. If they were prepared to offer 50 then you go into 10, how do these two things relate.

Q Suppose they offered 10, would you want to keep the negotiations open and see if you could better their deal?

A I would like to find out what they are

proposing. I don't shut the doors to negotiations if it makes sense. When you say 50 then you say 10, it's really quite a difference.

Q If they started at 10, you wouldn't shut the door to the negotiations?

A Let me put it this way. I always listen to a man that wants to come in and discuss a proposition.

Q You didn't listen to the 3M company when they wanted to come in and discuss the proposition in 1964?

MR. BLUMSTEIN: Are you saying did he listen or didn't listen?

MR. HRUSKA: We already established that.

MR. BLUMSTEIN: I don't think you established that.

A Harry Gerson listened to them and related the information to me. It was nothing of any importance, though I don't recall what it was now.

Q Do you know that Shapiro-Bernstein got a guarantee from 3M of $30,000?

A No, I didn't know it at all. I have no idea.

Q ~~Did~~ If 3M offered Gerson $30,000, you would have talked to them?

A Probably, but nothing like that ever came to us.

Q Wasn't there another factor here, Mr. Morris, in your refusal to continue these negotiations with 3M? Didn't you have the feeling that it is against the interest of publishers to issue direct licenses and that users ought to go through ASCAP?

MR. BLUMSTEIN: Object to the form. You may answer.

A I didn't think of it in those terms. The answer is, no.

Q On reflection, wouldn't you think of it in those terms?

MR. BLUMSTEIN: Objection to the form.

A Reflection upon what, the amount of money involved or the principle?

Q The principle.

A I can't answer that because something of that kind has never taken place.

Q When ASCAP enters a field, when they are engaged in the practice of issuing licenses, negotiating licenses with respect to a particular category of users, do you think ASCAP publisher members ought to attempt to negotiate direct licenses to

those users, with those users?

A I have to know a specific case before I can say yes or no.

Q How about the Columbia Broadcasting System Television Network? Do you think publishers ought to attempt to issue direct licenses?

A What price?

Q Whatever price they can get.

A If they are talking money, my doors are always open. If you are suggesting for the moment what I would say to that, I would say no, but I would obviously talk to anybody that represented Columbia. It is a big operation.

Q Why would your answer at the moment be no?

A Because there is nothing specific in what you said. It is just conjecture.

Q It is a matter of principle?

A I don't go by that.

Q I have to say your reaction to the 3M approach strikes me as very strange, the immediate shutting of the door to any possible future developments of those negotiations. There had to be somethin else in your mind other than the specific dollar figure mentioned by 3M. I say that particularly because a

lot of publishers eventually went into this on specific dollar figures which they thought were very attractive.

What else was in your mind in closing that door on future negotiations?

MR. BLUMSTEIN: I will object to the form of just about everything that you said.

I suggest you save your characterizations of the witness' testimony for another forum where it is appropriate and could you please try to reframe the question in proper form.

Q What else was in your mind?

MR. BLUMSTEIN: If anything.

A There is never anything other than that one exposure and what was offered was not of interest.

Now may I say something?

Q Yes.

A You say Shapiro-Bernstein was offered $30,000 or got $30,000. I never heard this. 3M never approached me or anyone I know of with these kind of figures. I don't know. When you are talking small money against $30,000, don't you think something is different? I didn't shut any doors.

They never came to me with anything that I considered of any importance.

A In your discussion with Mr. Gerson regarding the 3M approach, was there any discussion at all about loyalty to ASCAP?

A I am not in the loyalty business. I am in business so as I think are most people and have a practical approach to business. I never signed a pledge of any kind. That is not my business. It is a matter of economics, what I feel is good, constructive and healthy for my business.

A Don't you know that a lot of music publishers were good and mad about Shapiro-Bernstein and Leeds breaking the line and issuing direct licenses to 3m?

A I never had any conversations with anyone in that regard, possibly because I was remote and not in the center of what you are saying. It could have well been that they had an advantage deal. That was up to them to decide, but I didn't hear any $30,000 in my office nor had I heard anything even related to that, so I can't answer something that didn't take place.

A Don't you think that direct licensing by

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Can you exist in that sort of world?

A You are asking for something that I can't answer in that form.

Q Don't you believe that for music publishers to enter into a rash of direct licensing undercuts ASCAP and operates to the disadvantage of music publishers in general?

MR. BLUMSTEIN: Objection to the form.

You may answer.

A I don't understand that. What does that mean?

Q You believe that ASCAP's performance of the licensing function in in the best interest of music publishers, right?

A As it exists --

Q That ASCAP's performance of the licensing functions as ASCAP now performs that function is in the best interest of music publishers in general and the Edwin H. Morris Company in particular?

A I do.

Q Why do you believe that?

A History. I can relate to the past what happened, As an individual, it is quite different.

Q When you say history?

A I have been through this.

Q But there has never been a different history?

A What do you mean? You mean different from the one I have experienced?

Q Right. ASCAP has always licensed, generally, for music publishers?

A They didn't for a period of time with the company I was associated with.

Q You are talking about the music strike?

A Yes. I am talking about the withdrawals of Warner's catalog, which to me is history and an object lesson.

Q History teaches you that it is better for ASCAP to perform this function. Does it also teach you why? What are the reasons, the economic factors at work here?

A I believe it is healthy and justified as it operates today.

Q For music publishers to engage on their own in direct licensing transactions is inconsistent with ASCAP doing it for them, right?

MR. BLUMSTEIN: Is inconsistent?

MR. HRUSKA: Yes.

MR. BLUMSTEIN: I will object to the form

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into the future. I don't know what it would be.

A You just said you thought it was better from the standpoint of both publishers and broadcasters if ASCAP handled the licensing?

A I said it seems to be normal, orderly and intelligent.

Q But you also said when I asked you why it is better from the broadcasters' standpoint, that they would have all those difficulties.

A I am assuming they may have problems, I don't know.

Q In any event, it is better from the standpoint of music publishers in general, right?

A As it exists?

Q Yes.

A Today?

Q Yes.

A Yes.

Q So that for music publishers to engage in the direct licensing would worsen their position?

A As an industry, I don't know what the result would be. I just couldn't contemplate.

Q What is your business judgment?

A My business judgment is it would be

disastrous for me.

Q For these reasons, wouldn't you approach a possible direct licensing situation with a good deal of apprehension in terms of the possibility that this sort of thing, direct licensing, could spread and ultimately act to the disadvantage of music publishers and the Edwin H. Morris Company?

A I don't know where it would lead or what it would be. I can't tell.

Q Wouldn't you be concerned about it as a matter of business judgment?

A I believe I would be concerned, but I can't predict what the outcome would be.

Q Of course no one could predict. People can only form their own best business judgments and yours would be that this could represent a problem?

A Yes.

Q Didn't something of this sort of thinking enter into your disinclination to pursue any sort of negotiations with 3M after that initial approach to Gerson?

MR. BLUMSTEIN: Object to the form.

You may answer.

A It was not a matter of pursuing anything. There was just no further talks. There was never any proposition brought to us beyond the initial conversation which we weren't quite interested in.

Q Do you think it is a mistake for music publishers in general to enter into direct licensing transactions with companies like 3M?

A If that particular publisher sees an advantage in what he does, that is his business, not mine.

Q Isn't that a short-range consideration?

MR. BLUMSTEIN: Isn't what?

Q The immediate dollars and cents generated to a particular publisher in a particular direct licensing situation as opposed to the long-range problem of music publishers on a large scale basis entering into direct licensing transactions with users?

A What you are saying, these two things are not related?

Q They are related except that --

A You are comparing 3M with broadcasters?

Q What I am suggesting is, the short range advantage to a particular music publisher in a particular direct licensing situation is far outweighed by the long range potential and disadvantage which would arise in the event many music publishers entered into many direct licensing transactions with many users?

MR. BLUMSTEIN: I object to the form. You may answer.

A That covers so many different things that I can't possibly answer anyting like that.

Q Didn't you have the feeling that the publishers who entered into direct licensing with 3M were not really taking into consideration these long range problems?

A Now that you have told me they received $30,000 they were doing what they thought was best for themselves.

Q In the short range, but didn't you think they were failing to take into consideration the long range problem?

A I don't think they thought of range at all.

They thought of the immediacy.

Q Not what they thought, what you thought, what you think now.

A What I think now?

Q Yes.

A They were serving their own interest and that was one of those things that they thought was good for them.

I don't see that 3M, if the $30,000 figure happens to be a fact, could take publishers of equal importance all through the industry and give them the same thing.

That may propose and present an entirely different picture of the entire operation.

Q That $30,000 figure strikes you as high?

A I don't know what was involved, but I say in comparison to what I generally heard as to their offers, this is quite different.

Q Quite higher?

A Higher than what I heard. I didn't hear any specific figure but it was always small money.

MR. HRUSKA: We will see you tomorrow at ten o'clock.

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cassettes as well.

Q And you are interested in that business?

A Yes.

Q But you were not interested in the 3M business?

A Yes.

Q Why was that so?

A Because it didn't involve the same type of business.

Q But how did you know that unless you found out from 3M how far 3M was willing to go?

A I only know because of what ultimately became common gossip in the trade.

Q Mr. Morris, going back to your first knowledge that 3M had approached the Morris Company, at that point you did not even get from 3M any specific dollars and cents offer nor did you pursue negotiations with 3M to see how far 3M would go in terms of dollars.

Why didn't you do that?

A The pursuit should have been from them.

MR. BLUMSTEIN: I will object to the form of the question.

Go ahead and answer.

A If they were interested in licensing and they thought my catalog was of sufficient importance, it would seem to me a good commercial approach would be to come in with the proposition.

You have told me they made deals, far transcending anything that I have ever heard of before until I entered this room.

Q There must be something I don't understand about this business, Mr. Morris, because it just strikes me as very odd, and I would like if you possibly could to remove this odd impression for a music publishing company which is in the business of among other things, licensing mechanical rights, to refuse to, or to decline, if you will, to go forward in some fashion with a prospective customer like 3M after 3M has made the initial approach to you which evinced their interest in licensing your music?

MR. BLUMSTEIN: I will object to the f m.

Go ahead.

A It's impossible for me to answer a question regarding what you are talking about without having direct contact with these

people myself. Anything else would be hearsay, even from Gerson. It could be a nebulous conversation.

Let me say this. We are not interested in turning people down, that is our business.

Q Exactly. That is what strikes me as being so odd.

A Wouldn't it impress you if 3M was very serious about doing business with a rather important publisher which I consider myself, that they would pursue it? Such was not the case.

Q They approached you, they were the first, they broke the ice, they came to you?

A Yes.

Q Doesn't that in and of itself indicate to you that they had a live interest in your catalog?

A As I say, not having been present at the conversation, I don't know how live it was.

Q If an employee of yours, a responsible employee like Mr. Gerson came to you and said he had been approached by the Minnesota Manufacturing and Mining Company because they want to put out a tape cartridge and want to use some of

our songs, wouldn't that indicate to you that that company had an interest in your catalog?

A I presume.

Q So right then and there you know you have a potential live customer, isn't that so?

A If he is potentially live, the fact that Mr. Gerson didn't agree to whatever the subject of conversation was doesn't mean that htey would be that easily defeated if we had something that they wanted.

Q Easily defeated by what?

A By his saying no or whatever. I haven't had any detailed conversations with Mr.Gerson in some time. I can't be very explicit as to what his reaction was to them other than getting a verbatim rehearsal of that conversation. I can't.

Q Can you remember any other incident in the past in which you were approached by some potential customer, like a record company, with respect to a mechanical rights license -- let me read you this out of Allen Arrow's testimony -- do you know Mr. Arrow?

A I met him at the meeting at ASCAP.

Q Is that the only time you met him?

A He refreshed my memory I had met him on one previous occasion. I believe he was associated with Mr. Orenstein who represented Frank Loesser who was also a partner of mine and a friend.

Q Would you say Mr. Arrow has a good reputation in the music business?

A I couldn't answer that.

Q Have you heard of anybody speak ill of Mr. Arrow?

A I have no knowledge of Mr. Arrow in any respect.

Q Do you know Mr. Arrow is a lawyer?

A Yes.

Q This is the testimony Mr. Arrow gave under oath in his deposition and I am reading from page 235:

"Q Can you recall what exactly Mr. Gerson told you and what you said to him during that telephone conversation?"

This was the telephone conversation that Arrow said he had with Gerson regarding the possibility of 3M licensing compositions in the Morris catalog.

This is Arrow's answer:

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no details.

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Q I am not really asking you for that. I want to know whether it's true that the sole reason you did not really consider granting any form of license to 3M, was because the amount of money involved was too small?

MR. BLUMSTEIN: Objection to the form.

A I would say the amount of money did not interest us. There was no offer of anything other than what was generally known in the industry to be very small monies.

Q For you to say that the amount of money was too small, necessarily means that you had some idea at the time what the amount of money was.

A No. Let me put it this way:

The amount of money and the number of so-called outlets that they may have in homes didn't seem to me or to Gerson I presume, to be of any magnitude.

Q And you base that on figures mentioned by 3M or figures heard around in the industry, street talk?

A I would have to say there were no figures mentioned other than it was rumored it was a small deal. Gerson's conversation with me, it was unimportant, financially.

Q Based upon the rumors in the trade?

A When I say industry, a few publishers may have discussed it at different times. I have never been present at one of those. It's pure hearsay.

Q You are not basing this on any figures 3M mentioned. You are basing it on what was generally understood in the trade or among these publishers at the time?

A Possibly people that Mr. Gerson had discussed it with, I don't know. I never had any discussions with them.

Q Did you suggest to Gerson he ought to get some specific figures from 3M?

A No.

Q They didn't interest you?

A I didn't say that.

Q Why didn't you suggest it?

A 3M never came back to discuss anything beyond those conversations that you have now told

me that Mr. Arrow made in his telephone conversation with Mr. Gerson, so I have no knowledge of whether this was negotiable or whether it was a discussion that could lead beyond what I heard.

Q Weren't you curious to find out, though, how far 3M might go?

A My curiosity couldn't be aroused because I was not involved to the extent of knowing that much about it.

Q Wasn't Mr. Gerson curious?

A I don't know, I would have to ask Mr. Gerson.

Q Didn't he express to you some curiosity in this?

A No.

Q Have you ever pursued any record company to find out how far you could drive them in a bargaining process?

A That is an entirely different situation.

Q Why?

A Because a record company, the market is entirely different. The success of a song on a record is pretty well know. A hit is a hit.

You have a track pattern, so to speak, with companies, with artists and the importance of a copyright. This is one of the mainstems of a publishing company and its income, so the pattern is not new. This has been over the years. This is from established sales that are more or less well understood.

We can't predict the number of sales but we do know if Columbia has a hit with us, it's reasonable to expect because of the quality of the song, the artist and whatnot, that this will bring a substantial return.

Q And you believe the 3M project would not be a substantial return?

A I have no way of knowing other than I can only go by what is known in the trade as our normal way of doing business and that is through the mechanical companies, or the record companies. That is their business and their life and it's also part of ours.

Q The thing that stillstands out here, Mr. Morris, is that you had nothing to lose by pursuing negotiations with 3M or by attempting to get 3M into your place of business and attempting

to negotiate with them to get the best price they would offer.

On the other hand, you did have something to lose by not doing that?

A That is a matter of opinion.

MR. BLUMSTEIN: Let me object to the form.

Go ahead.

A Mr. Hruska, yesterday you told me that Shapiro-Bernstein received the sum of $30,000 from 3M, am I correct?

Q Yes.

A And that other companies, I presume you have not examined them at this moment, but the nature of their catalog is such that it would be reasonable for me to expect not knowing because this is my first knowledge of this, that even monies in excess of that could have been obtained and publishers of lesser importance could have received some percentage near to that.

I am a businessman. Mr. Arrow is a lawyer representing a substantial company. You are going to sit and tell me he had a phone conversation with Harry Gerson. If he thinks the Morris

catalog is of value and may I say here with no criticism of Shapiro-Bernstein, with my activity, if he was serious in his negotiations, phone conversations, anything of that kind, would have meant nothing to a man who wants something, so I don't agree at all on your premise that we turned him down. We simply turned him down because he came up with nothing that was of any sound value.

Q Is your catalog as good as Shapiro-Bernstein's catalog?

A In my opinion, but it's my baby.

Q How about Bourne?

A Better.

Q Leeds?

A Better.

Q Eastman?

A He is a lawyer.

Q He has a publishing company.

A Of course. So do my kids.

Q I take it you feel your catalog is superior to Mr.Eastman?

A Would you like to know why?

Q Yes.

A I am a very active publisher. Shapiro-

Bernstein was an old line catalog. They haven't had any activity in a number of years. When Leon Bretiler was happy to get $30,000, it wasn't because they needed the money. It was simply to properly enhance or hopefully project what they had. I am not in that business. I have an old line catalog, but I have many new things. Mine is a different business. That is it.

Q How about Joy Music?

A A good catalog. Inactive for a considerable length of time.

Q Not of the high quality as yours?

A Again we are discussing children. It's everyone's baby.

Q You said yesterday you had heard about the ASCAP board meeting at which it was announced that Shapiro-Bernstein and Leeds had granted licenses to 3M?

A Yes, I heard about it.

Q Did you hear at that time how much money was involved?

A Never. As I told you yesterday, this is the first time I have ever heard figures.

I consider Mr. ARrow a very poor business

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Q But you had heard that Leeds had granted?

A Leeds to me meant Lou Levy.

Q And the fact that Lou Levy had granted a license to 3M, did not intrique you at all in terms of the possible potential of a 3M deal?

A I didn't know about the potential, but I knew that Levy and Shapiro both thought they were making a deal that was good for themselves, but I never heard any figures and I must repeat, until yesterday, and I still don't know about Leeds, I have no idea and I never questioned them or had a conversation with them.

Q I understand that but what I am getting at, what you are saying to me is a matter of human nature, that when you heard as a result of an ASCAP board meeting that Levy made a deal with 3M, that fact might have inspired within you some curiosity about the potential of such an arrangement and since that is the way it strikes me, I ask you whether something like that in fact happened.

A My curiosity was not aroused at all until yesterday.

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any way.

Q Is this roughly what you thought it would have been?

A As I said before, I have no yardstick that I could use.

Q Let me return to the 3M situation for just a moment.

Did you ever hear of anybody from ASCAP attending any AGAC meeting with respect to the 3M situation?

A No.

Q Did you ever hear that Mr. Finkelstein had gone to an AGAC meeting?

A Not to my knowledge.

Q Mr. Finkelstein never reported to the ASCAP board on AGAC's involvement?

A There again, my answer is no. I have no knowledge of it.

Q Did you know that Mr. Finkelstein had urged AGAC to bring a lawsuit against ASCAP publishers which it issued direct licenses to 3M?

MR. BLUMSTEIN: Object to the form of the question.

You may answer.

A My answer is no.

Q Would that have been something for which Mr. Finkelstein should have obtained ASCAP board approval?

MR. BLUMSTEIN: Object to the form.

A I would have no knowledge of any such event taking place.

Q Let me turn to a new subject now.

I would like you to assume with me for the moment, Mr. Morris that the CBS television network announced that it had cancelled its ASCAP license and in fact did cancel its ASCAP license; that the other television networks remained as ASCAP licensees, and that CBS further announced that henceforth it would attempt to license all its music needs directly from writers and publishers, but let's assume predominantly publishers.

How would you react to that announcement?

A Well, I believe the first move on my part would be to hire the best counsel I could find, the most knowledgeable, to advise me as to what my obligation would be to writers and publishers -- I mean writers in ASCAP because of my contract.

Once that was clear, I would wait for the phone to ring. I don't know, I am a layman, not an attorney. I can't predict what conduct I would adopt after advice.

Q You say you would wait for the phone to ring?

A I amnot being facetious.

Q I understand. What you are saying, I take it, you would wait for television producers who are producing programs for CBS to call you and ask for licenses?

A I don't know who would be calling, whether it would be somebody in CBS acting on behalf of their producers. I don't know what direction it would come from. At that time I would have to make my decision as to what my attitude would be.

There again as a layman, I must, such as your clients do, seek legal advice.

Q Let's assume your lawyer has told you there is no problem in your licensing CBS or television producers, no problem vis-a-vis ASCAP, that you were perfectly free in law to issue such direct licenses.

A This is your assumption?

Q Yes, that is right.

A I will proceed -- what do you want me to do?

Q I haven't asked the question.

Would you be surprised of such advice?

A That I am free to go ahead?

Q Yes.

A I don't know, because that is what you think my lawyer would say. I don't know.

Q Is there some problem in your mind or some question in your mind as to the freedom of your company to issue a direct license for music to be used on the CBS Television network?

A May I say, I would have to defer this to counsel to find out.

Remember, as a member of ASCAP, I am not beholden other than contractual.

Q By saying you would have to refer this to a lawyer, you mean right now there is some question in your mind as to which you would like the advice of counsel?

A I would have to.

Q Now let us assume your counsel says "I have read your membership agreement with ASCAP,

you are free so far as your relationship with ASCAP is concerned, you are free legally to issue a direct license or any number of direct licenses for music use on CBS."

Then you wait forthe phone to ring? You wait for somebody to approach you seeking a direct license?

A I presume that my catalog is either worthy of consideration, you want things that are in there.

Q Would you solicit any television producer or any network representative?

A I don't know what form or what the industry or how complex it is. I couldn't answer that, I don't know. I don't know what my attitude would be.

Q You now devote some promotional efforts towards television producers, music directors, etc. Is there any reason you can think of why you would not approach those people and attempt to interest them in using your music and obtaining direct licenses for such use?

A No, I wouldn't do that. At the moment I am saying right now I have no deal with you people

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or with your network, so approaching about what, for what?

Q To make a deal.

A No, I wouldn't approach them.

Q Why not?

A I don't consider that -- if you decided that you don't want to renew the license with ASCAP, you have been a customer for a number of years. I would presume you would make an effort to find out what you would want from me, or if anything.

Q Wouldn't you want a nice share of that business?

A Tell me what the nice share is?

Q Let's say the same use of your music on CBS as is now the case.

A These hypothetical things I can't give you an answer. I don't know.

Q Would you want CBS's business, direct licensing business?

A Of course I am in business. I would like everyone in business to do business with me.

Q Why wouldn't you solicit their business?

A I am just saying at this moment, I don't think that would be good business on my

part. This is a matter of opinion.

Q That is what I don't understand. Why would it not be good business on your part?

A I can't explain it.

Q You must have some reasons.

A My reasons are my own. I don't intend to discuss them. I see no reason to at this time, because I don't know my attitude under a given situation. It's still a hypothetical question.

Q You did say you didn't think it would be good business.

A In a general way, I don't think anything is good business to approach a man in that way. I am begging. I don't think I ever will.

Q Do you consider your approaches to disk jockeys begging?

A We have licensing, we have a pattern, we have a format. We know what the return will be. You are talking about another situation entirely. I have no license with you. My material is not available to you unless you pay for it and maybe you don't want it, I don't know.

I have no intention of approaching you.

That would be my considered opinion at this moment, unless through an attorney or a man who has possible contacts that are beyond me, has reason to approach it in another way.

Q Supposing other publishers were approaching CBS and television producers as a result of this announcement?

A I can't speak for other publishers.

Q Would that induce you at all?

A I have no answer for that at this moment.

Q The fact that they were getting the business and you weren't.

A We don't always see things in the same light.

Q Let's recapitulate for a little bit.

You would have an interest in having your music performed on CBS and in your getting paid for such performances.

The use of your music and payments for your music would require the issuance of a license or series of licenses by you to CBS or the television producers putting together these programs, but your current feeling is that you would not

solicit such business.

Is that a fair summary?

A Yes.

Q And you wouldn't solicit such business because you would feel that it would not be good business from your standpoint to solicit?

A Let me say that you are calling for a conclusion there, I don't know.

Q I am calling for your own business judgment.

A I don't know. Business judgment only comes into play when you are faced with a definite concrete situation that either means disaster or what other action you can do to save yourself or an agreeable business proposition that you say, well, this is healthy, can we do it.

Q Let's try to make the facts more concrete and perfectly realistic.

The announcement is made at time one. There then follows a period of several months in which other publishers are visiting television producers. Their music is being used on CBS and your music is not being used.

Under those circumstances, would you solicit?

A You are asking for a wonderful answer and you are not going to get it. I don't know what my attorneys would say at that time. What another publisher does --

Q This would cause a legal problem in your mind?

A When I am talking to a man of your stature and representing whom you do, calls for that thought because I say, I am a layman. I don't know. There are many, many aspects which as you know I have been through it for years. My testimony has shown you the types of things I am involved with. I am cautious. I don't know. I am not prepared to say yes or no because I don't know. I am not being evasive, I just don't know.

Q Do you have a feeling that there might be any long-range problems to music publishers in general in the Morris Company in particular were many music publishers to engage in such solicitations of television producers and network personnel?

THE WITNESS: Let me have that again.

Q Let me make it easier for you

Do you think that the people, the music

publishers who engaged in such solicitations would be creating long range problems for the industry and for you?

A I don't know. I don't have a crystal ball.

Q Do you think it's a good idea for music publishers to solicit direct licenses in these circumstances where the television network has channeled its ASCAP license?

A I wouldn't answer that.

Q Why?

A Because what I have said previously covers my attitude.

Q Because you don't know?

A That is my answer.

Q Then you will answer it?

A If you call it an answer, you may have it.

Q If you honestly don't know, that is an answer.

Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the

compositions in the Morris catalog.

Do you talk to those people?

A Yes.

Q Do you invite them to come into your office?

A I will even go to theirs.

Q Let's suppose that the deal is a license which covers a substantial portion of your catalog, not all, but a substantial portion, and they will pay you $411 every time they use one of your compositions in a feature performance and a percentage of that $411 if they make theme uses or background uses of the music covered by the license.

Is this a deal that would interest you?

A I amno longer in your office.

Q Why?

A I don't like it.

Q Why?

A I just don't like it, that is my opinion.

Q Why?

A I don't consider it any that I am interested in.

Q Why?

A I just --

Q You would want more money?

A I am not saying what I want. You are talking songs, partial catalog. This is all within the realm -- I don't know, this is not something that interests me.

2b Q Okay. I would like to break it down if I can.

A You have broken it down.

Q I would like to see what parts of this are not interesting to you.

The partial catalog idea is something you don't care for?

A I am not saying that. When you said we would negotiate, I was with you there. Beyond that I am not with you in any sense because I don't know.

Q You think there would be some problem in licensing only part of your catalog, you would want to license the whole thing?

A In my judgment, I would have to then determine what I thought would be the right price for partial, and I would be in a position where I would have to consult -- the writers are my partners. These are all elements that have to considered. This is purely at that time an exchange of thoughts and ideas. Negotiation only becomes a reality when we talk economics, money, and so forth.

I am only saying my door is not closed. I want to talk but with advice and counsel and remembering all the factors that are involved.

Q Suppose the offer is for your whole catalog, so as to remove that problem at least. That the rest of the deal is the same, $411 for each use and substantial fractioning of that for each theme and background use?

A I can't answer that at this time.

Q This is a deal that you might well be interested in?

A I don't say that. This is something that would require a great deal of consideration on my part as to what my reaction would be.

Q You think the money is too small, $411?

A I think the money is always too small. In my opinion, the value of music is not the same as yours because otherwise I don't think we would be sitting here, true?

Q You get $411 from ASCAP. You are not unhappy with that, are you?

A We are not discussing happiness.

Q Of course. You always like to get more. Would you hold out for more than $411?

A I am not saying anything at this time. I don't know.

Q Would you give it away for nothing?

A Sometimes I think I am.

Q Would you give it away for nothing?

A Wait a minute, what kind of talk is that?

Q It is silly.

A It is silly and I am surprised you mentioned it.

Q Would you consider $100 a use?

A You are right back to the same thing.

Q It is also silly?

A I think anything that you are going to present to me here without official approval of your principals is silly.

Q Is the figure --

A What you are saying here is not negotiating. You are looking for an opinion from me which I can't give you because I don't agree from what I previously said with your line of questioning.

Q I want to know whether you think the figure of $100 assuming everything else about this license was perfectly okay.

A I would rather not discuss it.

A I know you would rather not be here.

A I don't mind being here at all. It is somewhat educational, but I have no intention of answering

something that I consider not worth considering.

Q Would you consider negotiating with television producers and/or network personnel, different prices for different songs, different per use prices for different songs?

A Yes, I believe so.

Q I assume from that, but just to make it clear, there are some songs in your repertoire that you would demand higher prices for than others?

A I think all music published by any publisher due to its longevity and all the other atmosphers have a bearing on what a publisher and a writer feels to have value.

Q Would you do this in advance of use or would you prefer to do this on a use by use basis? In other words, have the producer call you like a movie producer who immediately prior to using the composition and negotiate a separate price?

A I don't relate what is one in the motion picture business with what is done in broadcasting. I don't think the two things --

Q Forget about the motion picture side of it and just focus on the television side of it.

Which would you prefer? A price negotiated

in advance of any use or a price negotiated say on the eve of use when you have the details regarding the use?

A There again, I can't answer, I don't know.

Q Nothing occurs to you now in terms of possible advantages or disadvantages of either system?

A I can see many things. I don't know about advantages and disadvantages. I can't possibly arrive at what I would consider a fairly intelligent approach until I am faced with a reality, which would be the conclusion you are talking about, because there are many things that go there before we reach that, that is, in my mind.

Q Could you give us some idea of the kind of information you would want to have before you entered into these negotiations? What kinds of things would you seek to learn from the people who are asking you for licenses or from anybody else?

A Such a consideration could not take place until it became a fact of life and that is, in the future, if it may be, I don't know.

Q Would you want to know what other publishers were doing, what they were charging?

A I don't think there would be any question

about what I would hear. You would naturally hear these things.

Q You would be interested in that kind of input, would you not?

A Maybe, maybe not.

Q Why do you think there is a possibility you would not be interested?

A I am not saying not interested. Maybe not in agreement with what they were doing.

Q You may not be in agreement with what other publishers are doing?

A That is right.

Q You may think, for example, they were charging too little?

A I have no thought about that at the moment. We all operate differently. We all have different concepts of business. We all have different values in our own minds.

Q Would you be willing to engage in price competition with your competitors?

A I don't know.

Q To some extent?

A What I have he hasn't got so how can you compare the values?

Q For some uses you could?

A Who is going to be the judge of that one? I think Old Man River is probably better than some of the other things I have heard.

Q That is in your catalog?

A No, it is not. But it is a valuable copyright. It is certainly worth more than other compositions.

Q But there is a point at which compositions can be substituted one or the other on a television program, isn't that so?

A I believe it has been done in all phases of the motion picture business, the licensing of records.

Q Songs are substitutable, one for the other in different types of uses?

A It depends on what the producer warrants or what value he feels the composition may have.

Q Taking two examples. If you were going to produce Showboat, you have to use Old Man River. If you are going to produce a nightclub scene?

A You couldn't use Muddy Waters.

Q If you are going to produce a nightclub scene you could use a wide variety of songs interchangeable?

A You are now in charge of programs so it is your observation.

Q I want to get your judgment on this.

A I don't know. This again is a question of quality. It is a question whether your network is looking for the best or they feel it isn't that important.

Q In any event, you would assess your bargaining position with respect to your music in conducting such negotiations with television producers or CBS personnel; is that a true statement?

A What was that?

Q You would assess your bargaining position?

A I would assess it at that time?

Q Yes.

A As an individual publisher, it is my considered opinion at this sitting that my bargaining position as far as the assessment would be very small. I have lived with this history as you may have heard, so I don't say times haven't changed, but I think I am realistic about it.

Q In other words, your bargaining position as an individual is less than your bargaining position as part of ASCAP?

A I would say yes.

Q ASCAP has a superior bargaining position than anyone or group of its publishers?

A You have answered it.

Q That is true?

A It is true.

Q Now, for this reason would you believe that publishers who a-proached CBS or television producers would be making a mistake, that they ought to sit back and wait for CBS to come back to ASCAP?

A I can't answer that. I don't know.

Q Doesn't that concousion follow necessarily from what you said about the bargaining position of an individual publisher, vis-a-vis the bargaining position of ASCAP?

A Well, I am sure what I said before was correct, that is an individual publisher, my bargaining position is not of great strength, as an individual.

Q Coesn't it necessarily follow from that that the publishers who would be breaking the line, as it were issuing direct licensing, licenses and soliciting direct licenses, would be making a mistake?

A I don't know what they are doing.

Q That they ought to sit back and wait for the

network to come to ASCAP?

A I am not saying that. I am just saying --

Q I know you haven't said that up to now. I am asking you doesn't it necessarily follow from what you have said?

A That the publisher is better off-

Q Sitting back and waiting for CBS to come back to ASCAP?

A I am not sure. I don't know.

Here again I must remind you I have been through this before. I don't know.

Q If they are all going to have less bargaining position than they would as part of ASCAP, that will mean that they are all going to get less money; doesn't it?

A I don't know what the attitude of other publishers would be.

Q But I am asking for your judgment on this situation.

A I would not pass judgment on what other publishers publishers' feelings may be. I know as an individual that I would be obviously maybe in a weaker position because you may not want what I have.

rkbr 11 Morris

Q But don't you feel as an individual, as a man experienced in this business that these are the publishers who were in fact doing this?

A Doing what?

Q Issuing direct licenses and soliciting television producers and CBS personnel; that those other publishers were making a mistake; that they were acting in their short-range interest, not long-range interest?

A Each publisher has a different value and a different idea as to what procedure he would be taking at a time like that.

Q I am asking your judgment.

A I will not judge other publishers, for the same reason, their backgrounds, their whole corporate set-up is so different from mine, that I can't begin to see or say what they would do under a given situation.

Q Let me ask you this, then:

Don't you feel that those publishers who were issuing direct licenses will be embarking upon a course of action which would be to the disadvantage of your company?

A It's possible, I don't know.

Q Isn't it likely?

A I don't know the answer to that. It is conceivable that some publishers would make very advantageous deals with Columbia.

Q Don't you think it would be better off it CBS came back to ASCAP and took a licensing and dropped this direct licensing?

A I don't know because you embarked on something.

Q I am asking you whether you think you would be better off, your company would be better of.

A I believe I am better off as I am today.

On the other hand, I can't tell what would ever happen. Only my instincts would tell me as an individual, I believe it would be adversly affected. That does not say that other publishers are in the same position I am.

Q As an individual thinking now only of your own company, which you must necessarily I assume put first in your mind, you would be better off if CBS had dropped the project and came back to ASCAP and resumed the old system?

A They haven't left yet.

Q We are in this hypothetical world where they

have left and I am asking you, isn't it true from your standpoint you would be better off if they went back?

A I am in the same hypothetical world that you are. I don'tknow. You are jumping to a conclusion.

Q The reason I find some difficulty in your thinking in reaching that solution, is the premise you have already stated. You say you are better off with the present system than you would be if CBS had engaged in direct licensing?

A I know what I am today. I don't know what the future holds.

Q You did say that you thought your bargaining position was less?

A As an individual, I believe it would be.

Q Therefore, you would want to do everything you could to improve your bargaining position?

A We would all like to do that.

Q If your bargaining position is better when ASCAP licenses CBS, then the bargaining position you hold when CBS is direct licensing, then in a world in which CBS has started a direct license, you would have to prefer that CBS stop that project and went back to ASCAP; isn't that so?

A I think we have covered that fairly well.

I haven't disagreed as to what exists or what may exist in the future. There is no contradiction.

Q You agree with the statement?

A I admitted it. I don't think we need to dwell upon it.

Q You do agree with it?

A When you say agree, I merely pointed out what I think could be, but I also said there are many aspects, many contingencies which call for law, which call for many things that relate to writers, they are my partners, so this is complex. This may be Pandora's box. It could be, but I don't know.

Q You would approach the CBS project of direct licensing with some misgiving, I take it?

A I would have no misgivings after a meeting or may have other things, again, I don't know.

Q Wouldn't your misgiving derive from the fact that you would feel you have less bargaining position?

A I would presume, but we haven't reached that. They may like me. They may have something that I want that I don't even know about, but that is not a realistic world.

Q Let us take something that is quite realistic.

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A It doesn't sound like any business deal to me. I have no guarantees of any kind. $400 a use for what?

Q Whatever they use.

A You are putting a value on it. That doesn't necessarily mean that I agree with what you are saying. There is also the monitors. How do I know how you monitor it? I am not accusing you of dishonesty or inaccuracy or anything. I am simply saying this as a complex situation and there are hundreds of stations. This is not something I can say yes, no, maybe or anything else to you now.

Q You would have greater faith in ASCAP --

A Not faith.

Q Hear me out.

You would have greater faith in ASCAP's ability to do an accurate job on the monitoring side because ASCAP had done it for a long, long time, than you would in CBS' ability to do it?

A The monitoring is secondary. First comes what is involved financially.

Q Let us assume the money was something you thought was fair. Not as high as you wanted but in negotiation, it was fair?

A Would I be willing to accept your monitoring? Is that what you are saying?

Q A Yes.

A I would have to examine it. I must know.

Q I tell you that we are going to have the same people who prepare these music logs that we give to ASCAP which show to the best of our ability the title of the song, the name of the writer or writers and the name of the publisher and which show the kindof performance that was made of the song. These are going to be clerical people and they are going to look at the price schedule that we have agreed with you on and next to each performance, they will put in a dollar figure and we will print this out at the end of the quarter and send you the printout.

A I follow you. What you are saying is purely academic. This can be done by anyone.

Q Right.

A That is nothing. That has nothing to do with the deal.

Q This doesn't bother you?

A No, because I don't distrust CBS. I am sure they know how to monitor. They are professionals.

They couldn't afford to be otherwise.

What we are talking about is money, negotiations, money. What is your outfit talking about, money, whether it is worth something or not worth something, and I am talking money.

Here, this is a negotiation. We are nowhere near anything of that kind, not in this room. I must say this has to dome to pass before I can do anything than what I previously swated. The advise of counsel, what my attitude would be under any given situation, how I react and what steps I might take. I don't know. That is all I can say.

This is not threatening. I have nothing to threaten about.

Q Who said anything about threat?

A Maybe you fellows don't think about law as I do. Every time I think of a lawyer, there is a lawsuit.

Let us assume I look for judgment, where, why, what, where does it lead? You are a lawyer.

If you talk about logging, even if you agree to every concept that I feel is correct, that is only the beginning. I can't say more. I am sure CBS is in the same business of making money as I like to

make it. If they feel they have a bad deal, then they act accordingly. I must respond in the same way.

Q So you see no real problems if doing a deal like this assuming the money is right; is that the long and short of it?

A Money is definitely a major factor.

Q Assuming your lawyer blesses the whole thing?

A I don't use a lawyer to bless anything. I want his advise then I must say I must consider other elements from moral obligations, which are very strong in a business where you are dealing with writers and only fair and honest. I am not talking loyalty, loyalty to ASCAP. That isn't it. I am talking the moral and correct way to proceed. I have always done.

Q This is the point in not wanting to license only part of the catalog. You want to make sure you are fair to all writers?

A And fair to myself as well.

Q But also fair to your writers?

A It's a mutual thing.

(Luncheon recess.)

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Q In what sense?

A In my view.

Option, in a way means acceptance of your proposal from the standpoint of listening or it is a commitment.

Q Yes, it would be a commitment. It would work if you sold an option to CBS, CBS within a certain amount of time would have the right to exercise the option. The exercise of the option would automatically confer on CBS a license to your music at rates which you would have agreed upon at the time you negotiated the sale of the option.

A Well, I would say that in addition to the ASCAP membership, which means both writer and publisher and the individuals who would refer this to their own counsel for observation, a number of whereases and wherefors and what it is before we would reach any option stage, but I would not say I am not listening or anyone else is not listening. It requires a great depth of examination. There are so many facets, it is impossible for me as an individual to say what course to take.

Q Could you give me an example of some of those facets?

A I would say the examples entail the method of operation that we have enjoyed for many years with ASCAP, the writers' attitude which I consider extremely important, what the different publishers would feel insofar as where they have for years the premise and agreeably so, the definition of treatment all on the same level. This could lead to other, so I really don't know what individual companies or corporate setups, what their reaction would be to such an approach. I don't even know my own, I couldn't. One thing leads to another. There is nothing without entanglement or involvement. I can't be decisive.

Q Based on your experience, particularly the Warner Bros. experience, the Warner Bros. withdrawal of its catalog from ASCAP, do you think there is a good chance that writers might have some adverse reaction to this possibility?

A I believe so.

Q If you got to the point of actual talking about the options with CBS people, could you perhaps pinpoint some of the considerations or factors that you would want to think about in putting a price tag on the option?

A I don't see how I could do that.

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firm, option arrangement where there was a commitment by CBS, it's only logical that that publisher would be thinking in terms of futures as well as present if he happened to be an active publisher.

If he was a man that was simply satisfied he was accepting this on what he had and was not thinking in terms of the futures, that I presume would be another approach.

When we get through with the whole thing, an option is only a valid word to me when it represents a commitment in dollars. Otherwise, option can be thrown around.

Q There would be a commitment in dollars in the sense that if CBS exercised the option, it would be committed to pay you a hundred dollars for each ~~sheet~~ use of your music. If they did not exercise the option, they would not be required to pay you anything other than the option price. In fact, they would pay you the option price at the signing of the agreement?

A Then I suppose the option price for protection, my protection, just talking for myself, would have to be in temrs so I would never

have to worry again of any problems.

Q Could you explain?

A Very simple. I am not gambling. If it came to that. I want to be sure. When an option expires, here I am with egg on my face.

Q That option price has to be substantial enough to make you financially secure?

A I would expect, and I don't think I alone would feel that way because I have a writer, remember that. Every dollar I get, half of it is his and in some cases more, if they are partners.

So, I am not dealing just as a man who is selling out, so to speak.

Q Let's focus on music that has already been recorded in television programs or in theatrical motion pictures which CBS has a right to broadcast a certain number of times over future years.

Let's say that CBS's repertoire of such programming material already contains say a hundred Morris compositions and CBS as part of its negotiations with you would want to include in the package of this license arrangement, rights to perform those compositions.

Would you feel your bargaining position with respect to performance rights for those compositions, would be stronger than your bargaining position with respect to other compositions in your catalog which had not already been recorded in programs or films?

A Well, I have no way of knowing what the percentages in these areas would be, how I am affected.

Q Let's say at the time you sit down with somebody from CBS there have been, for example, five Glen Campbell programs, each one containing a performance of one of your works and CBS wants to get a license to those five compositions and they tell you they want to get a license to them because they want to re-run those programs. Each of those programs costs X hundreds of thousands of dollars to produce and it would cost a lot of money to take those songs out of the programs.

A Cost a lot to take them out?

Q Yes.

A Do you have a talk show if you take them out?

Q Yes. That is what I mean. As a practical matter, you can't take them out.

A I just don't have a property.

Q Yes.

When the CBS people come to you and say we want a license for those five songs because we are about to cancel our ASCAP license, do you feel you are in a pretty good bargaining position?

A Well, we first must cross the hurdle that we began with, because once there is an agreement, if such a thing came to pass, it would only be logical that we would continue to work in an area that would be practical.

But are you talking about a holdup?

Q I amnot suggesting you would hold up anybody. I am suggesting as a businessman you might want to press your advantage.

A If you have reached a point of agreement on a basic principal of catalog, it would only follow once you have made that step you have recalled all contingencies and I think this would be a reasonable negotiation.

That does not to mr or confront you with a problem. It would not be in faith -- if

if we should agree, me or others with you as to the approach and we are doing business, wouldn't it be stupid for me to try to hold you up in the future for something that could do us both good. I don't see that.

Q In other words, if we were negotiating, you and CBS were negotiating a deal for your whole catalog, the fact that X number of your compositions had already been recorded in CBS programs, would be a factor to take into consideration on the across the board prices for music in your catalog, but would not be something that you would isolate out and say for those uses, you have to give --

A I can't talk what anybody else would do, but if the basic deal met what I would consider a satisfactory reason for negotiation or discussion, once you have arrived at that, I would believe the normal and proper procedure would be here we have this certain number of things, that is not where it is.

Q The prior recording of these compositions in prior programs would be a factor you would take into consideration in ariving at price?

A Yes, and no. I would say this: Once

you made the first step, if it ever happens, the other would be not the making or breaking of any deal.

Q Suppose CBS just approached you on a one-shot arrangement.

A For what?

Q Let's assume it had already cancelled its ASCAP license and was attempting to buy music, catch as catch can. In other words, every time they had a program, they went to the publisher whose music they desired to use and attempted to obtain a license.

Let's say you were approached by somebody from CBS who said they wanted to get a license to five of your compositions that were in these prior weeks Glen Campbell shows.

A Or whatever.

Q And when we originally used the music, we had an ASCAP license. Now we don't have an ASCAP license, therefoer we need a direct performance rights license from you and what is your price.

Here I take it you would maximize your bargaining position?

A Maximize?

Q Yes. You would get as much as you thought you could, recognizing the superior bargaining position?

A We have two things here. One is the recorded program that you are speaking of, one that is in the can.

Q Music in the can, let's call it.

A The other is a situation where there is a composition you want.

Q Let's isolate the music in the can problem.

A I would say it would depend on the importance from my viewpoint, how important I thought it was.

Q Would you expect to get a better price for the music in the can than the price you would get for music which has not yet performed, is not yet in the can, even if it's the same music?

A Let me answer it the other way.

If it's in the can and you have it and you want it, that is one thing. As to what I would ask for there would be dependent on what is the value.

The other, you would be coming to me for a different reason. You would come because this is something, whoever it may be, thinks it's essential and important for that. I would tell you my price would be very, very high. I would exact any dollar I could get.

I would also the other, but I don't know which would be -- because I have you locked in, let's put it that way on one, that isn't the answer to me. It would play a part because I may be defeating both of us. You might say you have to cancel the whole thing. On therother, if you wanted an individual song, my price would be nigh.

Q Don'tyou think you could get more for the music in the can as opposed to just music on a producer's list as one of the possibilities?

A Occasionally it's a must. When is that, something that can't be replaced?

Q When the performer says I have to sing this song?

A No, the performer can be swayed. There are other situations. These are hypothetical.

Most things by and large can be replaced except for certain types of things. So my

bargaining power is not very great. But once it can be and I will get all I can.

Q Can you give me an example of a must situation?

A It could be a holiday of some kind, it could be a situation that involves a property that something is so involved with that -- there is no such thing as impossible, but there are a lot of factors on your side. Producers of taste and integrity want certain things. It creates a situtation all around.

Q A mood, a seasonal aspect?

A It's a very rare thing.

Q A geographical connotation, is that what you mean?

A Yes. It doesn't happen very often.

I must say this, the public, which is after all what you are dealing with, is apathetic generally. It has been proven, but there are situations --

Q Apathetic to improvement?

A No. This is not a crucial thing with them as a viewer, so many things can be substituted, there is no question about that.

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Q Al Berman?

A Yes. I dare say that a great many publishers and writers don't know him at all, who he is or what his stature is or what he represents. It's pursly a clerical thing because of his knowledge has moved into that position. He would not command the respect in this.

Q The Fox organization now represents more than a thousand publishers?

A A tremendous amount. It's a clearing house.

Q Would there be any reason why the publishers who are content to have Fox act as a clearing house for their motion picture business, performance rights and synch rightsnot want Fox to perform the same function vis-a-vis television networks?

A I would have my doubts because there the writer element I think would be in conflict.

Q Why is it more in conflict vis-a-vis the television network than it is vis-a-vis the motion picture producer?

A Well, ASCAP is a product of, I would say, mainly in the beginning, writers, and a few

publishers. That was their child. It was born. It has become an institution that represents all. It's known throughout the world for what it is.

Fox is a clearing house. There isn't any way to compare it. I am not being critical of the function of that, but I know that this would be a very complicated and very difficult and in some cases almost violent on the part of writers as to how they feel.

Q Of course, ASCAP used to license motion picture producers before the 1950 decree. It was only after that decree that Fox got into this?

A Yes.

Q And the writers have been content with that, haven't they?

MR. BLUMSTEIN: I think you have made a misstatement of fact as to what the sequence of events was but it is of no significance, go ahead.

A I don't think that that is related to what took place at ASCAP. It's quite different.

You say the writer is satisfied. Once the right was denied ASCAP, this I would say was a compromise of publisher and writer as an

expedient and way of doing business.

It's a small operation as such. The mechanical part of the business far transcends the other.

Q Suppose ASCAP were enjoined from licensing music for television network use, is there any reason why the Fox organization couldn't be broadened at that point to take in television networks as it was broadened in prior years to take in movie producers?

A By that question, you are giving me credit for a great deal more knowledge and influence that I have anything to do with.

Q In what area?

A I am a publisher. I am not the Messiah. This is not a role that I have anything to do with.

Q Well, you would find the need for a Fox type operation in circumstances in which ASCAP was not licensing television networks, isn't that so?

A I don't know where it would be.

Q You would find the need for some clearing house?

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Q Would there be a lot of price cutting, for example?

A Are you asking me that?

Q Yes. What would be the price caracteristics in such a marketplace?

A I suppose some would be more, some would be less. I don't know. That depends again on individuals, not only individuals, but it would depend on companies that have large investments. I don't know. I really don't.

Q Do you see a good deal of price competition occurring here?

A Price competition is something I don't see in the music business such as I would in the mercantile area because of the unique quality of what is involved. I am the only one that has what I have and Mr. Irving Berlin is the only White Christmas that I know of, so I can't say.

Q White Christmas is not a typical example.

A I didn't say it was a typical example. I just mentioned the fact. I suppose if I wanted to take catalogs and go through them and

review them, I would find many items.

You see, the freedom that CBS or any other medium enjoys today is a tremendous advantage, not always used, but it's nice to be able to do something and do it well because of the product that is available.

If CBS doesn't buy that and doesn't feel that way, I am not here, nor can I sit here and try to influence you that I am correct and your management isn't.

Q In other words, it is your view that if CBS were to attempt to license all of its needs directly, nothing through ASCAP, that the quality of the music they use would suffer?

A I don't say it would suffer. I don't know what the price of the situation would be. Some people who own large interests are not subjected to, or will be beaten to their knees by the economic factor. Those that can't afford, could be, so you have many areas here and whether or not these large operations, what attitude they would take or what procedure, is certainly not anything that I would know.

You know, when you have a large

investment, you think quite differently about it except the little fellow that has a few songs.

Q Some people would cut price and some people wouldn't?

A True. That has been proven in most anything, except there is one difference. It's not an item that anyone else has. You have that.

Q Except that some songs are more substitutable than others?

A Correct.

Q On one extreme we have White Christmas and on another extreme we might have, what, any one of hundreds or thousands of substitutable --

A Sometimes you can interchange, yes, that is true. I have seen this done. Having been affiliated with a picture company, I have had situations where the director had to have a certain thing. This is nothing new.

Q As to those songs which are in the more substituable or exchangeable side of the spectrum, price competition would be more severe than with respect to those songs at the other end ofthe spectrum, the White Christmas example perhaps being at the pinnacle of the spectrum?

A It depends on who controls it, because, they may not feel that way about it. There again, we are back to a matter of economics.

Q Given the fact that the peculiarities of human nature are likely to wash out looking at the big picture, all music, generally speaking there would be a part of the spectrum in which you feel price competition would be more severe than another part of the spectrum?

A It's conceivable that would happen. It's conceivable your people would write their own ticket in some of these areas. I don't know, that is possible.

Q No one is going to write their own ticket with you, are they, Mr. Morris?

A Why do you say that?

Q Just a feeling I have gotten over the last two days.

A No comment.

Q With ASCAP enjoined from licensing television networks, do you think that a substantial number of publishers would solicit CBS or the producers of CBS programs?

A I would expect that would happen, yes.

Knowing people, not necessarily publishers, people and their nature, how they wouldgo about it. I would say that could conceivably be so.

Q Let's assume that as a result of this lawsuit ASCAP were directed to issue a per use license, an ASCAP per use license to CBS, and let me explain to you what I mean by that form of license.

It would be a license in which CBS would pay ASCAP a certain administrative fee to cover administrative costs.

A To cover their administrative costs?

Q ASCAP. That is, a fairly allocable portion of those costs, allocable to the CBS per use license and each time CBS used an ASCAP composition, it would pay ASCAP a certain rate for that composition, let's say a rate to be set by the Court

Each ASCAP member would have the right to cancel ASCAP's authorization to license television networks.

A You mean CBS television network?

Q Let's assume all the three networks have it.

A You only have one action, why bring everything else into it.

Q For the purpose of this series of questions, let's assume the other television networks also, as a result of the action obtained ASCAP per use licenses of the same nature.

Do you have any initial reactions to how the market would work under that sort of licensing system?

A For the moment, confining it to CBS because that is why we are sitting here and what we are talking about, as a member of ASCAP I would then be in a position of either accepting the rates that were agreed upon with an ASCAP license or I would be in a position to say to ASCAP, I am sorry, as far as CBS is concerned, and I am assuming something, that the consent decree provides certain things -- that I am now an independent as far as your other licensees are concerned, I am a member, but in a limited area. That's it.

Q That is this assumed set of facts?

A That is where I am. I mean, I am telling you now.

Q You would cancel ASCAP's authorization?

A That is correct.

Q And you would attempt to negotiate your own deal?

A I don't know what I am going to do. I don't know. We will get there.

Q You wait for that phone to ring?

A Not necessarily even a phone.

Q You think somebody would be over your office pretty darn quick?

A Not at all. All I am saying, I would not accept -- I am not a chattel. I would not accept this. I would then decide with, as I said before, with counsel, I must have advice because I am a layman, as to what is the best procedure for me at this moment, as much as we have gone through this, I can't possibly tell you what my decision would be.

Q Except that you would cancel ASCAP's authorization?

A Definitely. I would have to. There would be no guarantee under your arrangement as to where I would be, what it would amount to, nothing.

I would much prefer to be in a

position, either if I got no call or nothing happened, I would be able to formulate my own plans and decide what I think is a business, what I think would be best for me.

I have no idea what other publishers would do. In this case it's not a matter of consulting the writer. My conscience would dictate that this would be the right way for me to do.

Q Your conscience or your business sense?

A Conscience, the same thing. I don't do business without a conscience. I am going to be thinking it through. My conscience gets to me at night when I get to the pillow and say what is right for me, how do I proceed.

Q Wouldn't this system give you more freedom than you now have?

A What do you mean freedom? I am not suffering.

Q Economically.

A I am not suffering from the standpoint of a certain security but I may have given up more in some respects than I would have received otherwise, but I believe it's healthy and good as an industry and also, I can't give advise to you. I

think it's healthier for everybody.

Q And you think it's healthier for the Edwin H. Morris Company?

A To make that move?

Q As it is.

A I am satisfied this is a practical method of operation for me, yes.

Q That makes sound business sense?

A I don't know what it makes, but I believe it.

Q Do you believe in it?

A I believe in it.

Q Under the present system,what voice to you have in determining how much money you receive in distributions for a CBS use of your music?

A What voice do I have?

Q Yes.

A I receive the same treatment as all other members.

Q If you wanted to get a higher price for your music from CBS, how would you go about doing it?

A I have no intention of even going in that direction. I am completely satisfied with what

ASCAP remits to me from the various sources.

Q Isn't it so, the only way that you could get a higher price from CBS would be by cancelling your ASCAP membership?

A Are you offering me more money, is that what you are saying?

Q I am asking you how you would go about getting a higher price for your music.

A Isn't it quite obvious the very thing you are attacking is that you are spending too much money and it's not economically sound for CBS? How, by what stretch of the imagination would I get more from you?

Q So you think there is no way for you to get under the present system, for you to get more money?

A Unless you like me so much you figure it's important or it would be nice to give me more. Remember, as an individual, you said before, where is my bargaining position, if any, as an individual.

Q So that the present system represents the maximum potential to you in terms of attempting to get as much money as possible for each use of your music from the CBS Television Network?

A I believe that management plus the directorate, who, after all, approve negotiations once they have been made, is as much of a voice I believe is necessary for me. I am not frozen out. They don't say to me I can't know what is being done. There is no such thing.

When you say more money and at the same time say that what you are aiming for is not to do business with ASCAP but to do it individually as you need it on a per use basis, that doesn't put me in a position of being able to negotiate from something that you need or want so much to have.

If you are saying to me you would like to pay more money, then we are not sitting here for any reason.

Q Let's assume, Mr. Morris, that your present rate of distribution from ASCAP is $411 for each CBS feature use of your song.

A All right.

Q Let's assume that the court were to set the per use rate at that same figure, $411.

Would you still cancel ASCAP's

authorization and license CBS?

A I will meet that when it happens, if it happens.

Q You were very definite before.

A You are not talking the same thing.

Q Because now I have given you a price factor.

A That is right.

Q Suppose the price were $300?

A My answer is the same. I would wait until this happens.

Q Youwould want to think about it?

A I would think about it.

Q At $200, you are still thinking?

A I think at all figures, because it's my decision at that time. It's not the same question you posed before.

Q There must be some figure at which you would definitely, as you put it before, cancel ASCAP's authorization. What is it?

A I don't knowat thistime. I still say I would do a lot of soul searching, examination of facts, in conjunction with advice I would receive from any and all sources available. That would

then be my judgment.

Q In other words, you would have to consider the advisability of cancelling ASCAP's authorization to license CBS and one of the factors that would influence your decision would be the amount of the per use rate set by the court?

A I wouldn't say that. I am not saying that. I am saying that when you told me that CBS would withdraw or would not use the ASCAP license --

Q They would have an ASCAP license?

A There are two different points. Before you had --

Q Let's make it very clear.

There is an ASCAP per use license issued to CBS under court direction at per use rates fixed by the court. Each ASCAP member has the right to cancel ASCAP's authority to license CBS.

The question is, do you or do you not cancel that authority?

A And what you said before, which is not the same, was that if you cancelled your license with ASCAP --

Q No.

A Yes, you did.

Q That was a different set of assumptions. Now I am on the assumption that CBS takes such an ASCAP license and --

A After the court decides what the rate will be, is that what you are saying?

Q That is right, but has the right to license directly from ASCAP members at whatever rates are negotiated in those negotiations.

A Then you have had two separate answers. One with your withdrawal that you have heard. I think that is clear. This is different. This is after the court has decided, correct?

Q Right. The court has decided.

A I then say I wait and weigh all the things that I have told you without repeating myself, so the two are separate in that respect.

Q So, given these facts, an ASCAP per use license which is accepted by CBS, and a form of license in which CBS pays ASCAP nothing if it licenses the music directly or pays ASCAP at the court set rate if it doesn't license the music directly, in those circumstances you would want to do some very serious thinking?

A In the latter one. That is when the Court has decided, right?

Q Let us forget whether this is new or different. Let us just take the facts as they exist.

Under these facts, you would want to do some serious thinking whether to cancel ASCAP's authorization and license CBS at the court rate?

A My decision would be to reach a decision after evaluating.

Q That is what I mean by serious consideration. You would evaluate all the facets?

A Yes.

Q That is a possibility you would cancel, there is a possibility you wouldn't cancel, right?

A I don't know.

Q Either you now know you would cancel or would not cancel or you now know there is a possibility you

could go either way?

A I prefaced that by saying it would take me until that time to make a decision, so for me to say yes or no or maybe now --

Q As of the present time, you recognize both possibilities, that is, the possibility that you would cancel, the possibility that you would not cancel?

A I will accept that.

Q If you did cancel ASCAP's authorization to license CBS at the judicially decreed rates, would you solicit CBS or television producers for that business?

A I don't know what attitude I would have at that time.

Q You might wait for them to come to see you?

A I am not suggesting or asking or saying anything in that regard.

Q You just don't know?

A I don't know.

Q You mean there would be a substantial number of publishers who would cancel ASCAP's authorization to license CBS in these circumstances?

A I would suggest you ask them.

Q If we have to, we will.

A I can't possibly decide another man's fate.

You think there would be a substantial amount of price cutting under such a system?

A I would expect most anything, up and down, who knows? I don't.

Q You mean prices all over the lot?

A Human nature is strange. You never know what people may do.

Q You mean prices can be all over the lot?

A It is conjecture. I have no way of knowing.

Q Have you ever been at an ASCAP board meeting where the question of CBS' request for an ASCAP per use license came up?

A I was not at the meeting when it did come up, but I received a resume of the meetings and I saw the report, which was just a report with no opinions, just simply stating the presentation.

Q Do you regularly get resumes of board meetings?

A It is generally -- reports are sent out so a member is cognizant of the issues that have been discussed so at the next meeting he is aware of it. These are what I would say a condensed minute so a man is aware of how things functioned.

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EXCERPTS FROM THE DEPOSITION OF WILLIAM S. PALEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, et al,

Defendants.

----------x

DEPOSITION of WILLIAM S. PALEY, taken before Isadora S. Borak, C.S.R., Notary Public of the State of New York, held at the offices of Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., 345 Park Avenue, New York, New York, on the 28th day of November, 1972, at 11:10 a.m., pursuant to Notice and stipulation of adjournment.

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RICHARD MILE, ESQ.,
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ALSO PRESENT:
ROBERT EVANS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the within deposition may be signed and sworn to before any Notary Public with the same force and effect as if signed and sworn to before the Court.

oOo

WILLIAM S. PALEY, having been first duly sworn by Isadora S. Borak, CSR Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. TOPKIS:

Q Mr. Paley, I understand that you are currently chairman of the board of directors of CBS, Inc.; is that correct, sir?

A Yes.

Q And you held that position since 1946?

A I think it was '47.

Q Who's Who says '46. I won't argue with '47.

A All right.

Q Prior thereto, I believe you were president

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Q I am amalgamating my word with your counsel's.

MR. TOPKIS: I call it the ASCAP pool. ASCAP calls it the ASCAP repertory because there are connotations to pool. So we compromised on repertory/pool.

(Question read back.)

A It is essential for us to have the right to broadcast a certain amount of music. I am not sure whether it is necessary for us to have the entire so-called "/pool."

Q You got along without ASCAP music for a greater or lesser duration than 30, 40 or 41, didn't you?

A Yes, we got to know about JEANNIE WITH THE LIGHT BROWN HAIR, too.

Q We all did.

Is it your feeling, Mr. Paley, that the operation and competitive vigor of CTN would be significantly affected if you didn't have access to ASCAP music?

A On the basis of the other networks having access to ASCAP music?

Q Right.

A Yes. I think that would be a very serious competitive disadvantage.

Q Really? You think people would stop listening to CBS?

A No, I didn't say that. I said we had been in a competitive disadvantage.

Q What do you mean by being in a competitive disadvantage?

A It would be more difficult for us to produce shows for one thing. We would not be able to allow the artist who wanted to produce a certain number or sing a certain number or use it for background music from using it if he was not able to obtain the right to do so.

Q So there would be a certain handicap?

A Yes, sir.

Q Would that be an economic handicap or stylistic handicap, cultural handicap, what?

A On all fronts.

Q How would it hurt your pocketbook?

A If our shows were not produced because artists did not like the restrictions placed on them through our inability to provide the music, we would not have certain shows which competitively might be important to us, and might have an adverse effect on our circulation.

Q You say it might do that?

A Yes.

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BORAK REPORTING 150 NASSAU ST.

EXCERPTS FROM THE DEPOSITION OF EMIL D. POKLITAR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, et al.,

Defendants.

----------X

DEPOSITION of EMIL D. POKLITAR, taken before Isadora S. Borak, C.S.R., Notary Public of the State of New York, held at the offices of Hughes, Hubbard & Reed, Esqs., One Wall Street, New York, New York, on the 30th day of March, 1973, at 10:35 A.M., pursuant to Notice and Stipulation.

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of Counsel

-ooo-

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel, that the within deposition may be signed and sworn to before any Notary Public with the same force and effect as if signed and sworn to before the Court.

BORAK REPORTING 150 NASSAU ST.

EMIL D. POKLITAR, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. DAVIDSON:

Q Will you state your name, please?

A Emil D. Poklitar.

Q And where do you reside?

A Number 3 Danbury Court, Suffern, New York.

Q Are you sometimes known as Duke Poklitar?

A I am.

Q Have you read Mr. Sipes' deposition in this case?

A Yes, I have.

Q Are you employed by Columbia Broadcasting System, Inc.?

A I am employed by CBS Television Network.

Q Which is a division of Columbia Broadcasting?

A Yes.

MR. HRUSKA: The record so shows, yes.

Q And what is your job title?

A Associate director of Music Operations.

Q What is your educational background, Mr.

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SESAC, Inc.?

A I was employed by Hill & Range Songs, Inc.

Q What is the business of Hill & Range Songs, Inc.?

A They are music publishers.

Q What was your job title at Hill & Range Songs, Inc.?

A I had no title there.

Q What were your duties?

A I organized and set up their copyright renewal system.

Q Did you have any other duties other than that?

A No.

Q Whom did you report to at Hill & Range Songs, Inc.?

A I think his name was Freeland Landon. I am sure the last name was L-a-n-d-o-n.

Q During what period of time were you employed by Hill & Range?

A 1955 to '56.

Q When you left Hill & Range did anyone succeed you?

A I don't know that.

Q What employment did you obtain after Hill & Range?

A I was employed by the CBS Television.

Q What was your job there?

A I was assistant -- administrative assistant to the manager of the Music Clearance Section.

Q And for how long did you hold that position?

A Something over two years.

Q What were your duties as administrative assistant to the manager of the Music Clearance Section?

A I assisted the manager.

Q And what were his duties?

A Supervising the operations of the Music Clearance Section.

Q What were these operations?

A Clearing of music for television programs, radio network programs.

Q Is that the extent of his duties?

A There might be situations where synchronization rights might be negotiated where they might be required.

Q Were there such situations?

A Yes, there were.

Q Who was the manager of the Music Clearance Section at that time?

A Clark Harrington.

Q What position did you assume after you were

administrative assistant to the manager of the Music Clearance Section?

A I then became manager of the Music Clearance Section.

Q For how long were you manager of the Music Clearance Section?

A Until 1970.

Q Were your duties the same as those of the previous occupant of that office?

A Yes, they were.

Q And what job did you assume in 1970?

A Associate director of Music Operations.

Q Did someone else then become manager of Music Clearance?

A No.

Q Who was director of Music Operations in 1970?

A Louis Teicher.

Q And is Mr. Teicher still director of Music Operations?

A He is.

Q Was there a reorganizations of the Music Operations area at CBS in 1970?

A A reorganization?

Q Yes.

A How do you mean?

Q You assumed a new title at that time and no one took the position that you had previously held?

I was just inquiring whether that was part of a general reorganization of the department.

A No, it was a promotion.

Q Did you assume new duties on taking the job as associate director of Music Operations?

A No, the duties remained essentially the same as manager of Music Clearance.

Q How long has Mr. Teicher been director of Music Operations?

A I think it is around ten years.

Q What functions does the Music Operations Department have other than the clearance functions to which you previously testified?

A The administration of staff musicians.

Q Are there any other functions?

A Handling payrolls for staff musicians.

Q Is that all?

A There might be cases there there would be negotiations with composers for the composition of scores for film programs which CTN might produce.

Q How many employees at CBS Television Network have music clearance functions?

A Eight.

Q Do all of them have their offices at CBS's headquarters in New York?

A No.

Q Where are they located?

A Five are in New York and three are in California.

Q Do the five in New York include you?

A Let me just count. No, I suppose I could change that. There are six in New York and three in California.

Q And do the people in Music Clearance, both in New York and California, report to you?

A Yes, they do.

Q What are the duties of the employees in California?

A The same as New York.

Q And what are those duties?

A Staff members are assigned certain programs and the music and the titles and other information on the songs which are produced or planned to be used are submitted to whatever person is assigned to that program.

Q Does the California personnel handle programs produced in California?

A Yes.

Q You mentioned staff musicians. Does CBS

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Television Network employ staff musicians?

A Yes.

Q What are their duties?

A I am not in that area. They perform as musicians.

Q On Network programs?

A So far as I know, they are Network programs.

Q Do you know what sorts or programs they perform on?

A At this moment I can't answer that.

Q Does the Music Clearance Department of CBS Television Network submit documents indicating performance of music on the Network to performing rights organizations?

A By "documents," you mean music logs, music reports?

Q I am asking you.

A We submit music reports, yes.

Q In the case of a motion picture which might be performed on CBS Television Network, what sorts of documents would be submitted to the performing rights organization?

A We would submit a copy of the music cue sheet.

Q Music cue sheet?

A Yes.

Q By whom is the motion picture cue sheet prepared?

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A The individual who prepares it?

Q Yes.

A I don't know the individual.

Q Is it prepared by a CBS employee?

A Which programs are you talking about?

Q I am talking about a motion picture.

MR. HRUSKA: A theatrical motion picture?

MR. DAVIDSON: A motion picture.

MR. HRUSKA: There are lots of motion pictures. Everything you see on television moves.

Q A motion picture which had previously been performed in movie theatres.

A In movie theatres?

Q Yes.

A And who prepared the music cue sheet?

Q That is right.

A I would think it would be somebody at the production company who produced the picture.

Q Then your department obtains a copy of that document from the motion picture producer and forwards it to the music licensing organization?

A Whoever the supplier of the motion picture is.

MR. HRUSKA: Off the record.

(Discussion off the record.)

BY MR. DAVIDSON:

Q In other words CBS would obtain the cue sheet from the firm which supplied the motion picture to CBS?

A That would be correct.

Q Does CBS check any of the information on the cue sheets for accuracy?

A No, we simply forward copies to the licensing organization.

Q On mechanical basis, then, some individual under your supervision who is assigned to the motion picture programming on CBS Television Network would make sure that he had obtained the cue sheet and forwarded it himself to the performing rights organization?

A Yes.

Q In the case of a filmed program on CBS Television Network, which are not produced by the Network, what sorts of documents would CBS submit to the performing rights organization?

MR. HWORKA: Is he to a filmed program not a theatrical motion picture?

MR. DAVIDSON: That is correct.

A The same sort of thing. As we call the cue sheet would exist and we would obtain that cue sheet from the supplier of

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the program.

Q Would the cue sheet for film programs be reviewed by your department for accuracy?

A No.

Q In the case of a motion picture which had previously been performed in theatres, does the employee of your department who obtains that cue sheet ascertain whether CBS has public performance rights to perform the music in that motion picture?

A That would be long after the cue sheets were returned by the society for the licensing organization.

Q In other words, CBS submits the cue sheet to the performing rights organizations and they indicate which music is licensed by them and return the cue sheet to CBS?

A That is right.

Q To which licensing organizations does CBS submit such cue sheets?

A To ASCAP and BMI.

Q Are cue sheets submitted to SESAC?

A Not as a general rule.

Q Are they sometimes submitted to SESAC?

A They might be.

Q In what circumstances might they be submitted

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the episode?

A There may have been.

Q With respect to live programs on CBS Television Network, how is music clearance handled?

A Live programs?

Q Yes.

A The producer or whoever is assigned by the producer for that job submits the music information to my department as to what they wish to use on the program.

Q Is that submission in the form of a cue sheet or some other document?

A It could be by means of a list or it could be by telephone, or both.

Q If clearance is sought by telephone, is that followed up with a written document?

A No, I don't think so.

Q What kind of document or documents does CBS submit to the music rights organizations to indicate music performances on live programs?

A These are what we call music reports.

Q Is the term "logs" sometimes also used to describe such documents?

A Could be.

Q Have you heard such term used?

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A Yes.

Q Who prepares the music report?

A That would be typed up by the person in my department who is assigned to handle the program.

Q Is the music report prepared after the telecast of the program?

A It is generally prepared before the telecast of the program.

Q But is it sometimes prepared afterwards?

A I don't believe so.

Q Is it ever amended afterwards?

A It may be.

Q Is the music report submitted to the performing rights organizations in advance of telecast or after telecast?

A After telecast.

Q How does your department ascertain whether CBS has the right to telecast music performed on live programs?

A We presently maintain a card file on compositions.

Q For how long has CBS maintained a card file?

A At least during the 17 years that I have been there.

Q Is that file maintained alphabetically by composition?

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A Yes.

Q What would appear on each card?

A The title of the composition, the writer, the name of the publisher and the date on which either ASCAP, BMI or SESAC acknowledged that it was in their repertoires.

Q Is there any procedure for updating the card file in cases where ASCAP or BMI or SESAC might no longer have the right to clear that composition?

A Yes.

Q And what procedure is that?

A In the case of BMI, a deletion list, we update the file.

Q In other words, some employee is assigned to take the BMI deletion list and go through the card file and make the appropriate notations on the cards in your file?

A Yes.

Q What procedure is followed in respect to ASCAP and SESAC?

A I don't believe that either of the other two groups issued lists.

Q So that it is conceivable that the information on your card files might be inaccurate in the case of a composition which might have passed out of the ASCAP or

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A That is correct.

Q What is then done with the music report?

A Copy of the report is then sent to the producer.

Q What is the producer supposed to do with it?

A Then he checks off the compositions which are used in the program and deletes any compositions which may not have been used in the program from the list.

Q What about compositions, performance of which may not have been anticipated at the time that the clearance information has been submitted to your department? Are such compositions added to the list?

A They would be added, yes.

Q The music report would be submitted to the producer after a performance, after a telecast?

A Before the telecast.

Q Before the telecast. Is it again submitted to him after the telecast?

A No.

Q Then if a composition were performed during a live program which had not been expected to be performed by the producer, the music report would not contain the name and other information as to that composition; is that correct?

A At what point in time are you talking about?

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Q I am talking at the point in time that the music report has been prepared; it has been sent to the producer and he has returned it to you.

A And he has added a composition?

Q No. You indicated to me that he returned it to you prior to telecast. Now, my question is: If a song was performed during telecast, which the producer had not expected to be performed, that composition would not be included on the music report; is that right?

A Well, if he knew that it was going to be performed, he probably would have been in touch with somebody in my department to clear it.

Q No. My question dealt with a composition which he did not expect to be performed.

MR. HRUSKA: You mean an ad lib, something like that?

MR. DAVIDSON: Possibly.

Q Or, for example, on a news broadcast when a coverage of a live event might pick up a performance.

A He would add it to the sheet and then we would amend the sheet.

Q It is my understanding that based on your prior testimony he returned that sheet to you prior to telecast.

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Yes.

Q If he does that, he has lost his opportunity to amend the sheet, has he not?

MR. HRUSKA: I object to the form of the question. It is argumentative.

Obviously, he can pick up a telephone.

MR. DAVIDSON: That is suggesting an answer to the witness, and I object to it.

MR. HRUSKA: Your question --

MR. DAVIDSON: My question is a perfectly simple question.

MR. HRUSKA: Okay. You can describe it the way you want to.

Q Do you recall the question, Mr. Poklitar?

A A situation where a piece of music is ad libbed?

Q Or otherwise unexpectedly performed during telecast of the live program, the music clearance sheet, the music report, excuse me, has been returned to you by the producer of the program prior to this live telecast?

A Yes.

Q My question is, does that performance become added to the music report and if so by what means?

A Then the staff member prepares what we call an add sheet, yes.

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Q How does the staff member become aware that such additional composition was performed?

A The producer has added that composition to his sheet.

Q Let's go back a little bit. You testified previously that the sheet has been returned to you by the producer prior to the telecast. At that point the producer does not know there is going to be an ad lib.

A I am sorry.

Q Now, he later finds that there has been an ad lib; what happens then?

A Well, you are talking about live programs?

Q That is right.

A I am sorry. In the case of live programs, the sheet would come to us after the telecast. As a general rule, that is my experience.

Q Have there been exceptions to that?

A We don't have many live programs.

Q Have there been exceptions to that?

A There may have.

Q But you can't recall any?

A No.

Q If I may attempt to summarize the procedure: Information is supplied to the appropriate person in your department by telephone or by means of a document from th

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producer indicating what music is intended by the producer to be performed. Your department attempts to determine whether rights have been obtained for such music and prepares a music report which is then returned to the producer.

Following the telecast the producer makes any additions or deletions which are necessary based upon what happened during the telecast and returns the report to you.

Do you then forward it to the performing rights organization?

MR. HRUSKA: Is that single or plural?

MR. DAVIDSON: Organizations.

A We then make the appropriate addition sheet showing that additional use.

Q In other words, the producer would not physically change the music report himself but would provide the additional information to the appropriate person in your department and that person would physically change the report?

A He would amend the music report.

(Discussion off the record.)

Q There is then a possibility under the music clearance system employed by CBS that a composition on a live program might be performed for which CBS did not have

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public performance rights; isn't that correct?

MR. HRUSKA: I object to the question on the grounds that anything is possible. It is perfectly obvious that any physical act is possible.

All right.

(Discussion off the record.)

Q Have there been instances when CBS has performed a composition on a live program for which it did not at the time of the performance have a performance license?

A Absent compositions which are in the public domain, I don't believe so.

(Record read.)

MR. HRUSKA: I thought it was "I don't recall any."

MR. DAVIDSON: I would like the record to state as reported by you. (To Mrs. Borak.)

MR. HRUSKA: What did the witness say? "I don't recall any" or "I don't believe so"? I thought you said "I don't recall any." I am not suggesting an answer to you. Whatever it was, I don't care what it was. I just want it to be accurate.

A I don't know. I have no recollection.

Q Mr. Poklitar, in the case of a live program

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does anyone in your department take any steps to verify the accuracy of the information which is contained in the music report?

A That is returned by the producer?

Q Or prior to its being sent to the producer.

I will limit it to after it is returned by the producer.

A No.

Q So that if the producer had included a composition which had not in fact been performed or had failed in fact to include a composition which was performed, there is no procedure in your department followed which might point up such an instance; is that correct?

A We rely on the information furnished by the producer.

Q You mentioned that there were very few live programs on the Network. What categories of live programs can you recall at this time?

A At this time?

Q Yes.

A News programs are live.

Q Are sports events?

A Football games, yes.

Q Parades?

A Yes.

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Q News specials?

A News specials might be live, they might be filmed, they might be videotaped.

(A brief recess was taken.)

BY MR. DAVIDSON:

Q Mr. Poklitar, how does CBS obtain public performance rights for the dramatic performance of compositions?

A Will you define "dramatic"?

Q By way of background, are you aware that the performance rights organizations only license the non-dramatic right to perform musical compositions?

MR. HRUSKA: Which performance rights organizations?

MR. DAVIDSON: ASCAP and BMI.

A I am aware that ASCAP has small performing rights.

Q I meant dramatic in the sense of the grand performing right as it is sometimes known. Do you understand what is meant by that?

A If I do, I am the only one in the business who does.

Q Would you agree that the telecast of a ballet would constitute a dramatic performance of a musical composition?

A Not necessarily.

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in connection with MUCH ADO ABOUT NOTHING?

A To the music in MUCH ADO ABOUT NOTHING?

Q That is right.

A The music, as I recall, was all background music.

Q I clearly recall feature performances.

A There may have been feature performances, too.

Q Where were the rights to that music obtained?

A They would have been cleared through either ASCAP or BMI.

Q Does it sometimes happen that music composed by a writer who is not affiliated with ASCAP or BMI is performed on CBS Television Network?

A ASCAP, BMI or SESAC?

Q Or SESAC.

A Sometimes it happens.

Q Are there any typical kinds of situations in which that happens?

A I suppose professional football telecasts might be one.

Q What kind of music would be composed by an unaffiliated writer for professional football telecasts?

A It would be music composed by a high school band leader.

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Q How does CBS obtain public performance rights in that kind of situation?

A Thatkind of a situation, the program handler would either contact the half-time band director of the team or the high school band director directly, and ask for permission to perform the composition.

Q When you refer to the program handler, do you refer to an employee of your department?

A Yes.

Q Is that permission ever refused?

A I can't recall any case where it was.

Q Does CBS pay a fee for such use?

A No.

Q Is the permission obtained in writing?

A There will be cases where we will get telegrams from the band leader, or a letter.

Q Do you have any form of agreement which you use in that kind of situation?

MR. HRUSKA: Any form of what?

MR. DAVIDSON: Agreement.

A There is a form of agreement, but we don't use it in that kind of a situation.

Q In what situations do you use the form of agreement?

A In those cases where a program might contain music composed by someone who is not with ASCAP, BMI or SESAC.

Q Yet the agreement would not be used in connection with football games in which that type of music was used?

A Generally not.

Q In what types of programming would the form of agreement be used?

A It could vary.

Q Could you give any examples?

A It might be a situation on a Camera Five program where a person who is not a professional songwriter, but essentially a musician, was involved in playing music, who was not a member of ASCAP, BMI or SESAC.

Q Does the form of agreement provide for the payment of a fee to the writer?

A I don't believe it does.

Q Can you recall any instance of that kind in which permission to perform the song was ever refused?

A In which situation are you talking about?

Q Can you recall any situation in which CBS sought to use its form of agreement which you have just described but the writer refused permiss[illegible] to CBS?

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A I have no clear recollection on that.

Q Do you have any vague recollection?

MR. KRUSKA: Don't answer it.

Q Do you have any recollection at all on that?

A I have no recollection.

Q Does the written agreement to which you have referred give CBS any rights in addition to the right to make public performances?

A Yes.

Q What other rights are included in that form of agreement?

A Synchronization.

Q Does CBS also seek a synchronization right from the composers, the unaffiliated composers, with respect to whom the form of agreement is not used?

A In what kind of a situation are you talking about?

In other words, the band leaders at half-time, do you obtain a synchronization right from them as well?

A No, these are live telecasts.

Q Do the synchronization and public performance rights obtained in the form of agreement operate in perpetuity, or are they for a specific performance only?

A It might be either way.

Q Does the form of agreement provide one way or

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the other?

A As I recall, there are two forms.

Q One form applies only to a specific performance and the other applies in perpetuity; is that the distinction between the two forms?

A One form applies to a specific program, the other form applies in general.

Q In what situations would one form be chosen rather than the other?

A Well, as a general form, I would think it would be in a situation where there was expectation of future uses.

Q Do you recall any instance in which CBS has paid a fee to an unaffiliated composer for public performance rights or synchronization rights?

A Yes.

Q What such situations do you recall?

A The situations where we performed the composition during a news program written by a composer who we found later-- who later filed a claim.

Q Did he file suit or just informally seek compensation?

A He had a lawyer who filed a claim with us, not a suit.

Q Is that the only instance you can recall?

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A That is the only one.

Q Are the public performance rights from unaffiliated authors and composers always obtained in advance of performance or are they sometimes obtained after a performance?

A I would say it would be before the performance.

Q There would be no instances in which such rights would be obtained after the performance?

A I can't recall any.

Q There may have been?

A I doubt if there was.

Q In the case of football games -- are football games produced by CBS Television Network?

MR. HRUSKA: I object to the form of the question.

What do you mean by the word "produced"?

Q Are football games obtained from an independent producer or is the production done by CBS Television Network?

A Define "production," if you would.

Q I want to ask you to define production.

MR. HRUSKA: It is your question.

George, it is common knowledge that rights to broadcast professional football are obtained

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from the professional football leagues.

MR. DAVIDSON: Yes, but there are other functions of a producer other than obtaining rights. It is not the same situation as a filmed program where CBS has something it can just crank onto the screen. There is a lot of --

MR. HRUSKA: Administrative work. That is what you mean?

MR. DAVIDSON: Yes.

MR. HRUSKA: Who performs administrative work vis-a-vis telecast of a football game?

MR. DAVIDSON: I will accept that amendment to my question.

A Will you repeat the question?

MR. DAVIDSON: Will you read back the question?

MR. HRUSKA: I will repeat it. It will make it easier.

Who, if you know, performs the necessary administrative work with respect to the telecasting of a professional football game? Can you answer that?

A I can't answer it.

MR. HRUSKA: I am sorry, you say, George.

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Q Is the person whose identity you don't know a CBS employee, nonetheless?

A I can't answer that.

MR. HRUSKA: I think neither one of us has made our questions clear enough to the witness.

Q With whom does the Music Clearance Department deal in connection with rights for professional football games?

A In connection with clearance of music?

Q That is right.

A It might be the half-time band director; generally it is the half-time band director.

Q The half-time band director then is not a CBS employee?

A He is not.

Q Can you recall the occasions on which compositions have been performed on CBS Television Network where the lyrics had been changed in such a way that they would not be covered by the original copyright on the composition and could not be cleared by the performing rights organizations?

A Yes, I can recall.

Q Does CBS obtain public performance rights to perform the new lyrics in those situations?

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A It contacts the publisher of the composition involved.

Q Do you refer to the publisher of the composition in its original form?

A Yes.

Q And what kinds of arrangements are made with those publishers in that type of situation?

A The program handler would read to him on the telephone the changes in the lyrics. There are times when he might ask for copies of the changed lyrics.

Q Is any formal permission sought from the publisher to perform the changed lyrics?

A He gives us his permission generally by telephone.

Q Is that confirmed in writing, in any way?

A I don't recall of any instances where that was done.

Q Are any public performance rights obtained from the author of the changed lyric in those situations?

A I don't know. We just call the publisher.

Q Can you recall any instances in which the publisher has refused to permit the performance of the changed lyric?

A Yes.

Q What such instances are those?

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A It would have been cases where the publisher felt he didn't want to allow any lyric changes.

Q Has CBS ever, nonetheless, gone ahead and performed the changed lyric in any such situation?

A Not that I can remember.

Q Has CBS ever paid a fee to a publisher for permission to perform a changed lyric?

A I don't recall any case.

Q You testified earlier that with respect to football games, your department ordinarily deals with the half-time band director. Is that always the case or is there some other person with whom they might deal?

A Most of the time that is the case. There may have been an occasional case where there would be a direct contact with the high school band leader. I should really say the half-time band leader. It is not always a high school band that is performing. There might be some other bands performing.

Q Has CBS Television Network ever performed any compositions which were originally composed as a part of a commercial message, such as an advertising jingle?

MR. BRUSKA: I object to the question. In its literal state I think it calls for a legal conclusion and I think that what we are

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A That may have been part of the latter part of the 1969 study.

Q Do you recall whether --

MR. HRUSKA: All right. Go ahead.

MR. DAVIDSON: Mr. Poklitar, in the latter part of 1969 did you prepare one study or did you prepare two studies?

MR. HRUSKA: On what subject? On any subject?

MR. DAVIDSON: On the subject of music usage, on CBS Television Network, feasibility, cost or desirability to CBS Television Network of a per use license.

MR. HRUSKA: The witness has answered twice that it may have been one study or it may have been two studies and he cannot recall and I think those questions are now bordering even unto tormenting of a witness and I direct him not to answer.

BY Mr. DAVIDSON:

Q Mr. Poklitar, would you adopt your counsel's statement up to the hyperbole as a correct restatement of your testimony?

MR.HRUSKA: Don't answer it.

Q You testified earlier that in your meetings

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with Mr. Sipes you discussed the alternatives of your per program license or doing without ASCAP and BMI licenses.

MR. HRUSKA: I object to the form of the question.

MR. DAVIDSON: What is your objection?

MR. HRUSKA: The word "alternatives".

MR. DAVIDSON: I believe that is the word used by Mr. Poklitar. I did not mean to imply that they were necessarily satisfactory alternatives in my question.

Q With that qualification, my question is, did you discuss any other possible alternatives or potential alternatives?

MR. HRUSKA: To a blanket?

MR. DAVIDSON: To a blanket license.

MR. HRUSKA: Your first list had per program, per use and no ASCAP or BMI licenses?

MR. DAVIDSON: No. I did not include per use.

MR. HRUSKA: I am sorry.

MR. DAVIDSON That was the fault of the question, really.

MR. HRUSKA: You really meant to?

MR. DAVIDSON: Yes.

A I believe we discussed the per use question, the per use matter.

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Q Did you discuss any other form of licensing other than the form to which you have previously testified?

A That is the per program, being without a license and per use license?

Q Yes.

A I don't recall any others.

Q What was said in your meetings with Mr. Sipes concerning per use license?

MR. HRUSKA: Those are discussions held not with counsel, with Mr. Sipes or other non-counsel?

MR. DAVIDSON: The question is not so limited.

MR. HRUSKA: Right. The direction makes it so.

MR. DAVIDSON: That is a direction rather than the qualification of the question?

MR. HRUSKA: Right.

THE WITNESS: Would you repeat the question.

(The question was read)

A We discussed the feasibility of such arrangement.

Q What did you say to Mr. Sipes?

A It was my opinion that such an arrangement would be feasible.

Q Did you give him any reasons for believing that such an arrangement would be feasible?

A It was my opinion that it would be feasible.

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Q Did you give him any reasons why you believed it would be feasible?

A I may or may not have, I don't remember.

Q Did you suggest the possibility of a per use license to Mr. Sipes or is that something he told you about?

A I believe it just evolved during our conversation.

Q Do you know who coined the terminology "per use license"?

A No, I don't.

Q What were the features of the per use license as you discussed them with Mr. Sipes?

A That there would be a world where we would be able to have a per use arrangement with ASCAP and BMI and also a situation where we would license music rights directly with members of either society.

Q Were there any other terms of a per use system other than those you have mentioned?

A Not that I can remember.

Q Did you tell Mr. Sipes that there would be any advantage in dealing directly with composers and publishers?

A I may have.

Q Do you believe that there are such advantages?

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MR. HRUSKA: I think we are going off into an area where this witness is not really competent to testify. He is not an economist, his job is clearing music and I really think that his judgments on this subject are not relevant.

MR. GITTER: I think that statement is an outrage. This man is the first witness you have produced who professes to know the slightest thing about the music business. You have asked similar questions of publishers of writers, of people dealing with clearances

MR. HRUSKA: People dealing with clearances; whom do you mean?

MR. GITTER: Harry Fox Agency.

MR. HRUSKA: Oh, yes.

MR. GITTER: I think your statement is an absolute outrage.

Q Is Mr. Sipes an economist, Mr. Poklitar?

A I don't know whether he is or not.

Q Mr. Poklitar, do you believe that the per use system offers advantages to CBS Television Network over the blanket licensing system?

MR. HRUSKA: Go ahead, you know, I just do not see how Mr. Poklitar's opinions on this subject are

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determine whether such follow-throughs had been made?

MR. BAKER: You mean ever?

Q During the year 1969 to the present.

A As part of my normal supervision of the department I may have.

Q You don't recall one way or the other?

A I probably have had cases -- there had been cases.

Q How did such cases come about, if they did?

A Yes, I suppose there would be occasions when I would ask a staff member, "Is the music in for such and such a program?"

They would answer yes or no.

Q When music clearance information or music cue sheets have not been submitted prior to telecast, are inquiries to the producer regarding that situation made orally or in writing?

A Generally they are made orally.

Q Are they ever in writing?

A There may be instances where they would be made in writing. I can't recall of any.

Q Mr. Poklitar, do you know whether CBS Television Network has made any selection of the BMI and ASCAP compositions which it would desire to license under a per-use system?

MR. BAKER: I would instruct you to limit

your answer to any selection made other than at the request of counsel.

MR. DAVIDSON: That is absolutely astounding.

MR. GITTER: I think we should go down to Judge Lasker right now.

MR. DAVIDSON: That is telling us you won't tell us what kind of license you want.

MR. BAKER: You mean as to the specific compositions we would like under that license?

MR. DAVIDSON: Yes.

MR. BAKER: I think that is something that is in the ~~release stage~~ relief stage of the case.

MR. DAVIDSON: Let's put a little more of this --

MR. GITTER: I would like to get what we are now allowed to get on the record.

MR. BAKER: Would you like me to state it?

BY MR. DAVIDSON:

Q Have you been instructed by counsel to select the compositions which CBS would desire to license under a per-use license?

MR. BAKER: I think we can solve this if you agree that any answer he may give is no waiver of any attorney-client or work product privilege, all right?

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A What is the question?

(The question was read by the reporter.)

A No, I have not.

Q Have you been instructed by anyone to make such a selection?

Have you been instructed by anyone to keep any sort of record or engage in any kind of study, or take any other steps consisting of preparation for the selection of such compositions?

MR. BAKER: Go ahead, it is the same line of questioning.

A Would you ask that again?

(The question was read by the reporter.)

MR. BAKER: It is the word "study" which bothers me.

He has testified he has not made such a selection, he hasn't been requested by anybody to make such a selection.

MR. DAVIDSON: I am asking him whether he did anything by way of preparation for making such a selection.

MR. BAKER: Other than records he keeps in the ordinary course of business, any additional step?

MR. DAVIDSON: Yes.

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MR. BAKER: Answer the question.

A No.

Q If you were directed to make such a selection, how would you go about it?

MR. BAKER: This is a selection of the songs which is subject to the ~~previous~~ Per-use 2 license which CBS seeks in this action?

MR. DAVIDSON: That is correct.

Q With that assistance, can you now answer the question I most recently posed?

A I suppose we would take into consideration the content of the ASCAP, BMI performed works index, review of past music logs, popularity charts from the trade papers, consultation with producers.

Q How long do you believe it would take you to make such a selection?

A Not knowing the details that would be involved in the per-use, I can't answer.

Q Have you given any thought prior to today as to how compositions would be selected?

A I've given some thought to it.

Q I take it that no review has been made of the ASCAP and BMI performed work indexes, producers have not been consulted and past music logs have not been reviewed up to this point; is that correct?

MR. BAKER: Read the question back.

(The question was read by the reporter.)

MR. BAKER: I am going to object to the question unless you limit that to whether things have been done for the purpose of selecting music that would be subject to the ASCAP and BMI per-use licenses.

MR. DAVIDSON: That was the intent of the question.

A Read the question back.

(The question was read by the reporter.)

MR. BAKER: For the purpose of designating songs to be subject to any ASCAP or BMI ~~produced~~ per-use licenses which might be granted. These things have not been done with that purpose in mind. These things may have been reviewed for some other purpose but not for this purpose.

MR. GITTER: Why don't you have him answer with respect to any review study at all?

MR. BAKER: I will object except to any review study made by counsel.

Q Mr. Poklitar, for the purpose of selecting compositions to be covered by an ASCAP or BMI per-use license, have you or has anyone else at CBS reviewed the ASCAP

or BMI performed works indexes, consulted with any producers or reviewed past music logs?

A This must be a thick day. Would you say it again?

MR. DAVIDSON: Mr. Reporter, please read the question back.

(The question was read by the reporter.)

A No.

Q Does CBS Television Network currently hold a blanket license from SESAC?

A Yes, it does.

Q Some compositions from the SESAC repetory are performed on the network?

A Some are, yes.

Q Do you know Mark Moersen?

A Do I know him?

Q Yes.

A Yes, I know him.

Q Who is Mr. Moersen?

A Who is he?

Q Yes.

A I believe he is with the music department of NBC.

Q Is he your counterpart at NBC?

A I don't know NBC's structure.

Q Do you believe him to be your counterpart at NBC?

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MR. DAVIDSON: Let me take 30 seconds to confer.

(A brief recess was taken.)

BY MR. DAVIDSON:

Q Mr. Poklitar, under a per-use license as you understand it, would CBS Television Network inform a writer or publisher of a composition included in the [illegible]e nucleus that CBS Television Network intended to perform that composition prior to the performance?

MR. BAKER: Repeat that back.

(Question read back.)

MR. BAKER: I would have to object to the form of it. I don't quite understand it. I think I know what it means.

A I don't understand the use of the word "nucleus."

Q That's Mr. Hruska's term. I would hesitate to define it. Let me phrase the question this way:

Under a per-use license, as you understand it, would CBS Television Network inform the writer or publisher of a composition in the ASCAP or BMI repertoires which had been designated by CBS to be included in the per-use license that CBS Television Network intended to perform the composition prior to the performance?

MR. BAKER: I will continue my objection

as to form.

MR. DAVIDSON: Off the record.

(Discussion off the record.)

MR. BAKER: If CBS were going to rely upon the per-use license for the performance of a work in a show made available to its affiliates, would the network so advise the writer or publisher that it intended to so rely prior to the performance? I suppose added to that should be your statement,"based on your understanding of the per-use license."

A Without having any way of knowing what the circumstances of a per-use license with ASCAP or BMI would be at this point in the game --

Q Let me put it this way, Mr. Poklitar: A per-use license as you would hope to obtain it.

A If we are talking that we would have a per-use license with ASCAP and BMI, your question is if we were to avail ourselves of that license, would we contact the composer or publisher?

Q That is correct.

MR. GITTER: Before the performance?

A Before the performance?

Q That is right.

A At this point in time, I don't think we would.

Q Would you say that New York, Los Angeles and Tennessee are the major music publishing centers in the United States?

MR. BAKER: Objection as to form.

A All of Tennessee?

Q Nashville.

A I know that there is a concentration of music publishers in those three points, geographical points. I don't know if I can characterize them as major sources.

Q Are there any other geographical points in which a comparable number of music publishers are concentrated?

MR. BAKER: Objection as to form.

A Size of numbers of publishers?

Q Yes.

A I would have to think about that.

Q Think about it.

A Will you give me more than 30 seconds?

Q How about 60?

A There are publishers scattered throughout the United States and the world who might be considered important publishers.

Q That's not responsive to the question, Mr.

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the record will show. You don't have to tell him where his responsibilities are.

MR. BAKER: Well, wait a minute now.

MR. GITTER: Please. Let's not fight.

MR. BAKER: Okay.

MR. GITTER: We will try to get Mr. Poklitar out of here.

BY MR. GITTER:

Q I believe you testified last time that your department sometimes negotiates and acquires synchronization rights; is that right?

A Yes.

Q Could you tell me what synchronization rights are?

A I can give you the standard language.

Q That will be fine.

A The right to record a musical composition in synchronization or timed-relation with a motion picture.

MR. GITTER: Would you read it back?

(Answer read back.)

Q So do I understand correctly that it is a right to record rather than a right to perform?

A Yes.

Q And is it a right, I suppose the word is,

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is it a right to synchronize with a film and also a tape?

MR. BAKER: You are asking him for his understanding and not a legal conclusion?

MR. GITTER: Yes, please.

Q I don't mean to be asking you for any legal conclusions.

A Yes, I would think that tape would also be included.

Q On what occasions does your department acquire synchronization rights?

A Where a particular program contained a musical composition and that program was to be syndicated, and wherever it was required -- such right was required, we would negotiate the synchronization.

Q Who in your department actually does the negotiating?

A It would either be me or my assistant, Frank Monroe.

Q Who do you do the negotiating with?

A Generally, the Harry Fox Agency.

Q Any particular person with the Harry Fox Agency?

A It varies. If you want to know the present person --

Q All right, I will take the present person.

A Allan Fennell, I think his name is.

Q Do you recall who it was before that? I don't mean to tax your memory.

A No, I don't.

Q Other than the instance where the program is going to be syndicated, are there any other occasions where your department does the negotiating for synchronization rights?

A It has been a practice in the industry, in the television industry for many year that when a program is repeated on the network, there comes into play a situation which is called a repeat fee.

Q Go ahead.

A And it is a standard fee, generally, of $25, and it is handled on a very informal basis of billing from Fox to CTN and CTN to us.

Q And your department typically negotiates with the Harry Fox office for this repeat fee, or is it done so informally that no negotiations are required?

A I doubt that it can be characterized as negotiations. It is just an automatic thing.

Q But somebody does call the Harry Fox office to tell the Harry Fox office that there is going to be this repeat?

A Well --

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Q Excuse me, or do I have it all wrong? Is it done long before the original showing?

A No, it would be done when the repeat is scheduled and actually took place.

Q Before it took place or about the time or after it took place?

A It would be after the repeat took place. We were never absolutely certain that the repeat would take place.

Q Are there any other occasions on which your department acquires -- negotiates for synchronization rights?

A When Cinema Center Films Division was in existence, we had negotiated some synchronization rights dealings with Fox.

Q And that would be your or your assistant, Mr. Monroe?

A Monroe.

Q Cinema Center Films was an organization, am I right, that produced motion pictures?

A Yes.

Q That are called made-for-TV movies, or what?

A Some were made for theatrical exhibition and some were made for television.

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conclusion.

MR. GITTER: I will withdraw it. I will withdraw the question.

Q Can you tell me what your understanding is of what the Bernard Brody Associates and Mary Williams Music Agency do?

A My understanding is that information as to music used in those programs were given to either or both of those organizations and it may be that they obtained synchronization rights. I really don't know what their day-to-day dealings are.

Q But aside from them, those two organizations, that is, it is your understanding that the producer acquires the synchronization rights to film the taped shows where they are required?

A Where they are required.

Q Is that right? Your answer, then to my question is yes?

A I would say yes, that is right.

Q And --

A As best I can speak for what the producer does. I really don't know on a day-to-day basis what he does.

Q I understand. Do I understand correctly, then, that one of the things that CBS wants to accomplish

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MR. GITTER: I am asking him if he is aware of it.

MR. BAKER: Yes.

A I have told you that I haven't read Dr. Stanton's--

Q Deposition.

A I don't know.

Q And you weren't told that?

A No.

MR. GITTER: Mr. Davidson wants a break. Let's take a break.

MR. BAKER: Fine.

(A brief recess was taken and the deposition resumed.)

BY MR. GITTER:

Q Mr. Poklitar, can I go back with you to the subject of synchronization rights?

A Yes.

Q On synchronization rights, they are acquired for film and tape shows; is that right?

A Yes.

Q And limited, of course, to filmed and taped shows which contain music?

A Yes.

Q All right. As the situation is now, somebody

acquires those rights, either your department or the producer or Bernard Brody and Mary Williams organizations; isn't that right?

A Yes.

Q I am trying to phrase it so your counsel doesn't object.

Am I right that for essentially all of CTN's prime time programming, the shows are either filmed or taped?

A Did you say for virtually all, or what?

Q Essentially all.

A Essentially all?

Q Yes. By the way, I mean by "prime time," the evening hours, eight to eleven.

A Nighttime?

Q Yes.

A Yes, I would say so.

Q All right. In fact, can you think of any regularly scheduled CBS nighttime program that isn't filmed or taped?

A Regularly scheduled?

Q Yes.

A News programs.

Q Other than the news programs?

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A Other than news?

Q Yes.

A I can't think of any.

Q Let's talk about the daytime programming.

A All right.

Q Aside from news shows, is there any CTN daytime programming that isn't filmed or taped, regularly scheduled?

A There may be a daytime serial which is still live, but I am not really sure.

Q You can't think of any daytime serial that is still live?

A Offhand, I don't, no.

Q I [illegible]

A There was one. Whether it is still live, I don't know.

Q Which one was that that you had in mind?

A I don't know. SECRET STORM I think was one, but I am not absolutely sure.

Q But the game shows aren't live, are they?

A No.

Q CAPTAIN KANGAROO isn't live?

A No.

Q With the exception of news programs and with

the possible exception of SECRET STORM, all of CBS programming -- regularly scheduled programming, that is, is filmed or taped?

A A daytime serial, whether is is SECRET STORM or not, or whether they are all taped, I don't know. There was one some months ago. Whether they have gone over to taping, I don't know.

Q But aside from those two instances, the news and the possible daytime serial, everything else on the network is filmed or taped?

A Yes.

Q Let me talk for a minute about the serials. Excuse me, let's both talk for a minute about the serials.

A All right.

Q Am I right that in the serials there is music performed?

A Yes.

Q And you know that because your office gets and transmits clearance sheets for that music?

A That is right.

Q All right. Am I also right that the music performed in essentially, in the serials, is essentially background and theme music?

A Well, I have trouble with your word "essentially." I

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would say there are occasions where published compositions are used on daytime serials.

Q But those would be very rare? They would be the rare occasion where one of the characters walks by a radio and --

A I wouldn't characterize it as rare. It depends on the plot circumstances.

Q What other occasions would there be other than the kind that I have just mentioned?

A There could be supper club scenes.

Q Yes?

A Occasions where an actor is playing the part of a musical performer and he will sing a published song.

Q Yes?

A And there may be the radio example that you gave. There might be a record example as you gave. There are probably others, but they are the main ones that I can think of at this point.

Q You will agree with me, the vast majority of music performed in terms of minutes on daytime serials is theme and background music?

A Well --

MR. BAUM: Objection to the form of the question.

A It would vary with the show. In terms of minutes, there are programs which have just straight organ music being played, or other kinds of music being played. Here, again, depending on the particular episode, the use of other music may be of longer duration than the background music.

Q Sometimes?

A Well. --

Q Typically, you will agree with me that the vast majority of the music on a daytime serial is of the theme and background variety?

MR. BAKER: Objection to the form of the question.

Q Mr. Poblitzer, maybe you are having trouble. Let me try it this way: The theme and background music is performed in almost every episode; isn't that right?

A Yes.

Q And non-theme and background music comes in only occasionally; isn't that right?

A Yes.

Q So am I right, then, that the vast majority of music used in daytime serials is theme and background music?

MR. BAKER: I object to the form of the

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question.

MR. GITTER: All right.

A I would think so.

Q Fine. That's all I was getting at.

Do the daytime game shows use music?

A Yes.

Q What kind of music?

A There are themes, backgrounds, play-ons and play-offs.

Q What is a play-on and what is play-off?

A When the host or the master of ceremonies of the program would come on stage as we call it, or a guest contestant or somebody would come on stage, there would be music played.

Q I see. It is like the Johnny Carson theme song, and if Jack Benny was coming on the program, you hear the Jack Benny theme?

A LOVE IN BLOOM, a published composition.

Q That kind of thing. Isn't that what you mean?

A It is music to --

Q Introduce somebody?

A To carry the person onto the set.

Q And that's for the game shows of the theme and background variety?

A Yes.

Q Who writes that theme and background music for the game shows?

A I can't answer that.

Q Does CBS emply any staff writers?

A Are you talking in connection with the game shows?

Q In connection with anything.

A No, I don't know that CBS employs staff writers.

Q Your department, I think you testified, pays staff musicians?

A Music Operations.

Q Music Operations Department?

A Yes

Q And you just don't know whether CBS employs staff music writers?

A No, I don't.

Q Do you know whether CBS employs staff music writers for the soap operas, what they heretofore have called the daytime serials?

A My answer there is that in some cases, CBS employs organists who perform their own creation.

Q I see.

A And they are employed essentially as musicians playing their own music, playing their own background music, if you would.

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Q I see. And your department, that is, the Music Operations Department, is in charge of those people?

A Yes.

Q Do you know how those people are paid?

A No, I don't.

Q I take it the music those people play on the organ is never published; play and compose?

A Never is a long time.

Q Typically not?

A I would think not.

Q Do you know whether that music goes into either the ASCAP or BMI or SESAC repertories?

A Are you speaking of programs where CBS would employ the organist?

Q Yes, and he composes something that he plays on the organ.

A I suppose there CBS or there the arrangement was for the performing rights to go into ASCAP, that would --

Q Do you know whether such arrangements are made?

A Well, here again, I am not responsible for making the arrangements. I can give to you a situation, say, where Eddie Layton might be playing an organ and I am told that --

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or sick leave.

Q Are there any provisions where you yourself handle, some of those that you yourself do the clearance for?

A No.

Q Is there somebody who regularly does that music is performed on a beat show?

A Frank Marcus does that.

Q I take it, music performances on news shows are fairly rare?

MR. DAVIS: Objection to the form of the question.

A Well, can we define "news shows"?

Q William Crawford.

A There are occasions when music is used on his show.

Q But those occasions are rare?

A Well, --

MR. DAVIS: Objection as to form.

A They might be rare.

Q Any other artist assignments? That is, are there any other categories of shows to which some of your staff members are regularly assigned?

A There are specials, but here again, that would be

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Poklitar

MR. GITTER: Yes, that is the question.

MR. BAKER: I think you are getting into something else.

MR. GITTER: Off the record.

(Discussion off the record.)

A I don't know the details of all the agreements with the producers.

Q I understand that.

It is your understanding that the producer indemnifies CBS against copyright infringement for music performed on the show --

A That's my understanding.

Q By the way, do you know who at the various producers prepares the cue sheet that is sent to your office?

A I have answered that.

I don't know.

Q I'm sorry if you did. My notes had that as a question.

Mr. Davidson, I think correctly, tells me that I haven't gotten the names of the other staff members in your department.

Can you give me the names of the staff members other than Anne Brown, Jeanne Thompson, Norma

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MR. BAKER: I will object to the form of the question.

MR. GITTER: All right.

Q I will rephrase it for you.

A I have trouble with your word "typically".

Q I know. Let me rephrase it for you.

Is it your understanding that when CBS produces a show and when music such as theme and background music is specifically written for that show, CBS acquires the copyright to that music?

A It would depend on the agreement with the composer of that music.

Q But typically, that is the case; is it not?

MR. BAKER: I think he answered your question.

MR. GITTER: Well, if he has, I really don't understand it.

Q Am I right, Mr. Poklitar?

A There may be occasions when CTN does have that.

There are occasions when CTN doesn't have that.

I can't quantify in my mind your use of the word "typical".

Q Can you quantify it sufficiently for, say,

in the majority of the cases, it is true?

A I can say in many cases in my experience, that has been true.

Q Can you tell me --

A You may have the same problem that I have.

Q Let us both try to quantify it a little better.

Do you know of any instances in which it wasn't true?

A Well --

MR. BAKER: Where theme and background music was used in CBS-produced programs?

MR. GITTER: Right.

And CBS didn't acquire the copyrights to that music.

A Well, are you saying or are you using "copyright" as synonymous with "performing rights"?

Q I am using "copyright" in the sense that some division of CBS, either April or Blackwood, another publishing company, would receive performance fees in connection with that music from either ASCAP or BMI.

A As to those programs where the performing rights were deposited with us -- with April or Blackwood, the answer would be yes.

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Q My real question then is this:

Can you think of any CBS-produced programs which have music created for the program and in which the performance rights are not deposited with April or Blackwood?

A Yes, I can.

Q What?

A GUNSMOKE series.

Q Right.

Any others?

A That's the only one that I can think of at this time.

MR. GITTER: Off the record.

(Discussion off the record.)

Q I take it there is a separate card for each composition that's in the card file maintained by your department?

A Each individual composition?

Q Right.

A Yes that's the way the file is constructed.

Q Do you know how many cards there are?

A I haven't counted them recently, but I would say in excess of 100,000 cards.

Q Have you ever had occasion to examine

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Q Each of the studies?

A Yes.

Q And did you show these studies to anyone other than the people at Cravath, Swaine & Moore?

A No, I didn't.

Q Do you know whether any person at CBS saw those studies?

A I don't know.

Q Let me ask it to you this way: Do you know whether any non-lawyer at CBS has seen those studies?

A I believe Mr. Shinder has seen the studies.

Q Other than Mr. Shinder?

A I suppose somebody who pushed the button on the computer saw the studies. I am not being cute. I am trying to answer it to the best of my ability.

Q I understand. You can't think of anybody at CBS other than --

A No.

MR. BAKER: Can we take a short recess?

MR. GITTER: Surely.

(A brief recess was taken and the deposition resumed.)

Q Mr. Poklitar, did you ever talk with a producer of a CBS show about per-use licensing?

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A I have not, no.

Q Have you heard of anybody at CBS talking with any producers of CBS shows about per-use licensing?

MR. BAKER: Other than discussions which you may have learned about from counsel.

MR. GITTER: I am not inquiring about any substance. I am asking only for identification, again.

MR. BAKER: My instruction is that if he learned of discussions -- the question was, was there any discussion between who and who?

Q Did you ever hear of anybody at CBS having talked with a producer about per-use licensing and --

MR. BAKER: Okay.

A I have not heard of any.

Q So to your knowledge, rather, so far as you know, nobody at CBS has talked with any CBS producers about per-use licensing?

A I will answer I don't know whether I have or not. I don't know.

Q You know of no such instance?

A I don't know.

Q Have you ever talked with anyone outside of CBS about per-use licensing aside from the Cravath people?

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A I was going to say, I spoke with my wife about it.

Q Anybody other than your wife?

A I don't think so.

Q Can you tell me what you told your wife?

MR. BAKER: Wait a minute.

MR. GITTER: On what? It is a perfectly okay question.

MR. BAKER: It is a point of law which I am not really up on. The husband and wife.

MR. GITTER: Off the record.

(Discussion off the record.)

MR. GITTER: On the record. I have asked this question without the answer constituting any waiver of any husband-wife privilege, and the husband-wife privilege, if applicable, can be applied later on to the testimony that I am about to get.

Q What did you tell your wife?

A In substance, the conversation would have been along the lines of "How do you feel today?" "I am tired." "Why are you tired?" "I have been doing a lot of work involved in a lawsuit."

Q Involved in per-use licensing?

A In a lawsuit.

Q I see. Mr. Poklitar, tell me what you see

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MR. BAKER: Okay.

Q You testified that in the competitive market, this is the market in which CBS or its producers would be dealing directly with ASCAP members is the advantage that CBS would have over the present system; is that right?

MR. BAKER: Objection as to form.

MR. GITTER: Off the record.

(Discussion off the record.)

MR. BAKER: I object to the form of the question.

A I have said that would be an advantage, yes.

Q Can you think of any other advantages that the per-use license would afford CBS?

A At this moment, no.

Q You cannot?

A No.

Q All right. Do I take it that the advantage of a competitive market for CBS is that CBS could acquire performance rights in a competitive market more cheaply than it does now?

MR. BAKER: Objection as to form.

Q Or do you not know?

A I don't know.

Q Do you have an understanding, Mr. Poklitar,

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A Well --

MR. BAKER: Max, you have been through this. He has answered the question and I previously gave an instruction on this line of questioning and I am going to repeat that instruction for the reasons previously stated.

Do not answer.

MR. GITTER: Will you mark this as ASCAP Exhibit 14 for identification, please.

(Document marked ASCAP Exhibit 14 for identification, this date.)

Q Mr. Poklitar, is there a form at CBS for interoffice memoranda?

A A printed form?

Q Yes. I mean, is there a letterhead that says "CBS Memorandum" in huge letters at the top?

A Yes.

Q Do you ordinarily use that form when you write memoranda to other people at CBS?

A Yes.

Q Do you generally initial memoranda?

A I generally put some kind of mark on it.

Q In your own hand?

A Yes.

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Q Did you have a secretary in September of 1969 whose initials were EDI?

A They are my initials.

Q Did you make it a practice of signing your own memoranda in September of 1969?

A It has been my experience that as to memoranda within CTN, it is not unusual simply to have the dictator's name without a secretary's initials.

Q Let me show you the document that we have marked as ASCAP Exhibit 14.

A Yes?

Q And ask you if you recognize that document.

Do you want the question read back?

A No, this would appear to be a retype of a memorandum that I sent to Mr. Teicher.

Q Did the memorandum that you sent to Mr. Teicher contain more writing than this one does?

A Well --

Q In other words, is this Exhibit merely an excerpt of a memorandum that you sent to Mr. Teicher?

A There are three asterisks on the bottom here. I would think there was something additional.

Q Do you remember sending this memorandum?

A I remember the memorandum.

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Q Can you tell me what else was on the memorandum?

A I can't really recall the rest of the memorandum.

Q Do you know any reason why your attorneys gave only an excerpt of your memorandum to Mr. Teicher?

A You will have to ask my attorneys.

Q You don't know of any reason?

A No.

Q No?

A No.

Q Mr. Poklitar, do you believe today that CBS is paying twice for the music described in this memorandum? That is, scores for filmed programs, special material for variety shows and play-on and play-offs and background?

A This memorandum is a request, a response to a request which was -- which Mr. Teicher gave to me or made to me as to suggestions which I might make on the subject of possibly reducing the allowable deductions under the ASCAP license. This was my suggestion, and I said that, in a sense, as it says -- do I say that? (Referring to document) In a very real sense, we are paying twice.

Q Was your suggestion to Mr. Teicher to add to the allowable deductions under the BMI and CBS licenses

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the music on the films set forth -- on the programs, rather, set forth here?

MR. BAKER: Objection to the form.

MR. DAVIDSON: I believe you said BMI and CBS licenses.

MR. GITTER: Withdraw that question.

Q Was it your suggestion to Mr. Teicher in response to his request that the allowable deductions under both the BMI and ASCAP contracts should be increased by deducting the music set forth here in this memorandum?

MR. BAKER: Objection as to form.

A That was the substance of my suggestion, yes.

Q All right. And so you were recommending to Mr. Teicher that CBS pay only once for this music by excluding from the ASCAP and BMI licenses any payments for this music?

MR. BAKER: Objection as to form.

A No, that was not my suggestion.

Q Then tell me what your suggestion was.

A The suggestion had in mind the possibility of broadening the allowable base of deductions which in my mind would have resulted in this: That had the cost of the creation of such material been included in the allowable base of deductions, then the percentage rate under the

licenses conceivably would go down somewhat.

Q Your point was not to pay for the performances of this kind of music because in your view, CBS really already had paid for it by putting on the program which incorporates this music?

A No, you are saying words --

Q That you are not saying?

A No, that I am not saying.

Q Then we are misunderstanding each other.

Let me understand what it is that you are saying.

You said in this memo that CBS or its producers pay composers to write original music, right?

A Yes

Q That's one payment, right?

A Yes

Q And then CBS paid a second time when the music is performed because it pays money to ASCAP and BMI for that music; isn't that right?

A Yes

Q What you want to avoid is that second payment?

MR. BAKER: Objection as to form.

Q Isn't that right? I mean, the point of your memo, if I understand it correctly, is that CBS

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shouldn't be paying twice for the same music?

A No.

Q Go ahead.

A The point of the memo was a suggestion as to a way in which the ASCAP/BMI base of allowable deductions might be reduced.

Q Right.

A Consequently, by virtue of those deductions, we would be paying less --

Q To ASCAP and BMI?

A Yes.

Q What is it that would be deducted, the cost of the revenues of the programs that use this kind of music; isn't that right?

MR. BAKER: I think I have an objection to form.

A No.

Q What would be deducted from what?

A The cost of the composition.

Q The original cost of the composition --

A Yes.

Q -- would be deducted from the fee for the performances?

A Would be deducted from the allowable base of allowable

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deductions.

MR. GITTER: Off the record.

(Discussion off the record.)

EXAMINATION

BY MR. DAVIDSON:

Q Mr. Poklitar, as you understand the old percentage-of-receipts licenses which were formerly in effect between ASCAP and BMI for the television network, the network was obligated to pay a percentage of a rate base which was composed of certain receipts of the network less certain deductions for certain expenses by the network; is that your general understanding of how those licenses worked?

A That's my generaly understanding, yes.

Q So that if you were in some way to be able to increase the allowable deductions, the rate base would go down so that when you applied the percentage figure to the rate base, you would end up paying a lower fee?

A Yes.

Q And what you were suggesting to Mr. Teicher in your memo is a way of increasing the deductions from the rate base so as to end up paying a lower fee?

A I would say that was just my explanation, yes.

MR. DAVIDSON: Thank you.

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Q Do you believe that with respect to CBS, a court could appropriately estimate the value of a composition to CBS?

MR. BAKER: Objection as to form.

A I believe a court could, yes.

Q The per-use rate would be the same rate for all compositions, right?

A Well --

Q That is, a feature playing of WHITE CHRISTMAS would get the same rate as a feature playing of HUBBA, HUBBA, HUBBA? Isn't that right?

MR. BAKER: If you want to make it his understanding, all right.

MR. GITTER: All right.

Q Isn't that your understanding? Let me tell you, from what your lawyers have communicated to us, it is my understanding.

A That would be my understanding, yes.

Q And you believe that a court could appropriately estimate the value to CBS of those compositions?

MR. BAKER: Objection as to form.

Q In a per-use rate?

A I have said that I believe a court could set a rate schedule for the uses of musical compositions by CTN.

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Q AS to feature uses, that rate would be the same for all feature uses; isn't that right?

A I would think so, yes.

Q All right. Do you think that a court is equipped to make a determination of the value of a given composition to CTN?

MR. GITTER: Objection to form?

MR. BAKER: I am going to object to the form and also--

MR. GITTER: I will buy it.

MR. BAKER: And also, if you will limit that to his understanding of whether a court is --

MR. GITTER: Of course.

MR. BAKER: Because I can't --

MR. GITTER: Of course I will limit it.

BY MR. GITTER:

Q Mr. Poklitar, can you answer that question?

A My understanding is that the court would be able to set --

Q It could do it fairly?

MR. BAKER: Objection as to form.

Q That is, it could set a fair rate?

A If the rate were set by the court, I would assume that the court assumed it was a fair rate.

Q Would you assume it was a fair rate if it were set by the court?

A I would assume that if it was set by the court, we would be bound by the rate set by the court.

Q And --

A But here again, I am making a legal assumption. I can't --

Q I am simply asking for your understanding of what might be fair. If a court set a per-use rate, would it be your view that the rate would be fair to CBS?

A Well --

MR. BAKER: Objection; objection by incorporation.

MR. GITTER: All right.

MR. BAKER: The lines two through six, I think it was of page 117.

MR. GITTER: Okay.

A It might be fair.

Q It would be fair?

A Yes

Q You are aware, aren't you, that under the present system, if a court sets the fee that CBS pays to ASCAP --

MR. BAKER: Objection as to form. And

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on the ground further that there is no place in this record any suggestion that that statement is true.

MR. GITTER: Bob, if you meant to convey something to the witness, I am sure he has already gotten it, but let me rephrase it.

Q Mr. Poklitar, you are aware that there is such a thing as an amended final judgment, are you not?

A Yes.

Q And you are aware also that fees for licenses between ASCAP and CBS are determined in the content of that judgment, are you not?

MR. BAKER: Objection as to form.

A Mr. Gitter, I -- I have not read the consent decree. I have no expertise on the consent decree.

Q But you do have an awareness that the fees that CBS pays to ASCAP are fees which a court has adjudicated or declared as reasonable fees; are you not?

MR. BAKER: I object to the form of the question. Point one, I think it calls for a legal conclusion.

MR. GITTER: What?

MR. BAKER: Yes.

MR. GITTER: Go ahead. Tell me the grounds

for the objection.

MR. BAKER: It calls for a legal conclusion. And further, I am sure it is in the record that the witness is not a lawyer.

MR. GITTER: Let's go back, then.

Q Mr. Poklitar, do you agree with me that when a court sets a fee for a license, in your view, it is a fair fee?

A I have said to you that in the event a court sets a fee which created a schedule of per-use payments under a per-use license --

Q That would be fair in your view?

A That would be fair.

Q If a court set a fee for a blanket license, would that be a fair fee in your view?

A I can't answer that. If you are discussing the interim fee situation, I can only respond to you that I know that there is a consent decree. I have not read it and I don't know the legal ramifications of that. I know a fee has been set and that's the full extent of my knowledge.

Q All right. Mr. Poklitar, do you believe that you could make a fair estimate of the value of any composition to CTN?

MR. BAKER: Objection by incorporation of

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the language on page 117.

MR. GITTER: Okay.

A Fair to whom?

Q Fair to CTN.

A I haven't given it that much thought.

Q Do you believe that anybody could make a fair estimate or determination?

MR. BAKER: Max, that question is so objectionable. Anybody in the world?

MR. GITTER: Anybody in the world. That is right. I mean anybody in the world.

Q Do you believe that there is anybody in the world who could make a fair estimate or determination of the value of any composition to CTN?

MR. BAKER: Objection by incorporation.

MR. GITTER: All right.

A I suppose there is somebody in the world who could make that determination.

Q But you can't think of that person, can you?

A There probably is somebody.

Q But you can't think of anybody as you sit here today?

A Well --

Q Can you give me the name of a person who you

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substantial number of telephone uses or maybe an unlimited number of telephone uses?

A It pays telephone bills.

Q But isn't that how telephone bills are paid?

A Well --

Q You don't pay at CBS, do you, a nickel for each call?

A Well --

Q Or do you?

Does CBS pay a nickel for each call?

A I don't know.

Q Do you at your home pay a nickel for each call?

A I wish I did.

Q But you don't?

A I don't pay a nickel.

Q Mr. Poklitar, this morning you testified that in a per-use world, ASCAP members would withdraw from the per-use license some compositions, or words to that effect; did you not?

A I believe I said they might withdraw.

Q When would that withdrawal take place, in your view?

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A If they elected to withdraw.

Q When?

A When would they elect to withdraw?

Q Yes. I mean, when in your contemplation would those elections occur?

MR. BAKER: I object to the form.

A You are asking me to put myself in the mind or the shoes of a member who might elect to withdraw. I can't answer that.

Q You don't think that you are qualified to be put in the shoes of a member of ASCAP?

A Well, as to at what point in time he might elect to withdraw, I can't answer for him.

Q But you are prepared to tell me that you can stand in the members shoes when you say that he would refuse to deal with CBS if CBS cancelled its ASCAP license; is that right?

MR. BAKER: Objection to the form of that question.

Q Is that right?

A It is my feeling that he would refuse.

Q Wouldn't you agree with me that that feeling if really nothing more than speculation?

A No, it is an opinion that I have.

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Q It is an opinion that you have?

A Yes.

Q All right.

A It is a belief that I have.

Q It is a belief that you have? It is less than an opinion? It is a belief?

A In my mind, a believe is more than an opinion. Either way.

Q Is it fair to say that it is really an article of faith with you?

A I suppose you can run the whole gamut of synonyms for belief, opinion, articles of faith. This is the way I feel.

MR. GITTER: Can we take a minute break?

MR. BAKER: Surely.

(A brief recess was taken and the deposition resumed.)

MR. GITTER: After consultation with my colleagues, I will want to get rulings on a number of the questions which you have directed this witness not to answer.

MR. BAKER: Okay.

MR. GITTER: Can I get an understanding from you that neither you nor any lawyer representi

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EXCERPTS FROM THE DEPOSITION OF FRANK STANTON

UNITED STATES DISTRICT COUNT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, et al.,

Defendants.

DEPOSITION of FRANK STANTON, taken before Isadora B. Borak, C.S.R., Notary Public of the State of New York, held at the offices of Paul, Weiss Rifkind, Wharton & Garrison, Esqs., 345 Park Avenue, New York, New York, on the 15th day of December, 1972, at 10:10 a.m., pursuant to Notice and Stipulation of Adjournment.

BORAK REPORTING SERVICE
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IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the within deposition may be signed and sworn to before any Notary Public with the same force and effect as if signed and sworn to before the Court.

--ooo--

F R A N K S T A N T O N, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. POPKIN:

Q What is your name and address?

A Frank Stanton, 5 East 92nd Street, Manhattan.

Q Mr. Stanton, you are customarily addressed by the honorific "Doctor"; what is the explanation, other than grace and courtesy?

A I have an earned Ph. D. There is another Frank Stanton in the City, and there has been a great deal of

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produce lower aggregate costs to CBS than a blanket license under the supervision of a court?

A After twenty-five years or more in this business I have the firm belief that competition will yield a lower overall cost than dealing with a common sales agent for all the writers and publishers.

Q Does that belief survive in the face of the provision of the amended final judgment that a court will set a reasonable fee?

A Well, this takes me back to something I said earlier, and that is, that I have more confidence in the marketplace for setting rates than I do have in the court procedure, with all of the problems attendant thereto.

Q Are you aware how many times CBS, on behalf of its various interests, has invoked those court procedures, Doctor?

A No, I am not.

Q Let me see if I can refresh your recollection. Let us talk about television.

There was a local television proceeding begun in 1952; there was another one five years later; there was another one about five years later; and there was another one five years later --

No, there have been at least three applications on behalf of local television stations to all of which

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your O's and O's are parties. There have been two or three applications on behalf of your television network. There have been applications on behalf of local radio stations and on behalf of your radio network. In all, I should say, at least ten such proceedings.

Does that refresh your recollection, that latter cumbersome recital I have just attempted?

A As I said earlier, I know we have made application. I do not know the extent of those applications. But in the final analysis the Court did set those rates.

Q In each case there were extensive negotiations between the parties with the Court keeping a benign eye on what went on and ultimately the matters were worked out between or among the parties and the approval of the Court sought by all of the parties to the results of their negotiations and such approval obtained and embodied in a stipulation to the effect that the rates thus resulting were reasonable within the meaning of the amended final judgment.

I think that is a fair recital.

MR. HRUSKA: Not quite.

MR. FOXIS: I thought it was but I feared correction.

MR. HRUSKA: In 1970, January, Judge Ryan

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made an order reflecting or stating something about reasonableness of fees. We objected to that order. We took an appeal and writs of mandamus and certiorari to the 2nd Circuit on that subject.

We settled that appeal by ASCAP agreeing that the order woul have no res judicata or collateral estoppel effect.

MR. TOPKIS: Okay. Now with that helpful amendment---

MR. KRUSKA: I did not ask for a recitation of the record, but if we are going to recite the record, I think it ought to be correct.

Q How all that I am trying to do, Doctor, is refresh your recollection that on a number of occasions CBS has invoked the procedures of the Court and I ask you, having that fact in mind, do you still hold fast to your skepticism about the courts as appropriate rate-fixing agencies in this context?

A Yes, I do.

Q Just so all right. I won't mind.

A The difference between us is that I would like

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to cut out the Court and go direct to the sellers of the music.

Q You have never done that, have you?

A That doesn't mean that it would not be a desirable thing to consider.

Q No. But I mean that you have never gone directly to the sellers of the music and attempted to negotiate with them?

A Why should we? We would be paying twice.

Q That is if you maintained a blanket license you would be paying twice?

A Absolutely.

Q But it is not written in letters of gold that you have to maintain a blanket license.

Have you considered the possibility of negotiating directly for the music that you want to broadcast or of having your producers, the producers with whom you deal?

A That is embraced in the application for the per-use license.

Q An application that you make by way of a court proceeding.

I am asking you, since you seem to have such an aversion to judicial proceedings, an aversion which

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I confess I often share--

MR. HRUSKA: I object to that.

MR. TOPKIS: All right. I will start again.

Q I just want to know whether you have entertained the possibility of going out and negotiating directly.

A Within the framework of a blanket license?

Q No, sir. As you say, that would be rather pointless.

A It would be unrealistic in this competitive world to go on our own on that basis.

Q You formulated that judgment?

A I have.

Q When did you do so?

A In connection with the per-use discussions.

Q You say that that would be unrealistic because your competitors would continue to have blanket ASCAP license; is that right?

A That is right.

Q Did you ever consider the possibility of discussing it with your competitors?

A Never.

MR. HRUSKA: Good boy.

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Q Of course, Doctor, if you prevail in this lawsuit your competitors will follow suit forthwith, won't they, in seeking per-use licensing?

A I can't speak for my competitors.

Q You respect them as men of at least slight business ability, don't you?

A I give them everything I give myself.

Q Then certainly they would be seeking per-use licenses in a flash, wouldn't they, if you got one?

A I cannot testify to that.

Q In the per use licensing system which you seek to achieve by this litigation, would it be your expectation that the producers would normally come to CBS with the performance rights already obtained for the music involved?

A No. It could take a variety of forms but I would contemplate that the producers would go direct to the suppliers.

Q Wouldn't you insist that a producer come to you with the performance rights cleared?

A Yes. But I don't see how that reads on whether we would do it or the producer would do it.

Q Would you not insist that the producer bring you a show with the performance rights already cleared?

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MR. HRUSKA: I object to the form of the question.

What do you mean by "insist"? Reject the programs if they did not clear all music on the programs or obtain all the music on the programs--

MR. TOPKIS: Yes, yes.

A We would not knowingly broadcast the program for which we did not have rights.

Q That is not my question, Doctor.

My question is this: A producer comes to you with a program, offers it to you, and he says, "Everything is all ready to go except I don't have the performance rights to the music."

Would you not say to him, "Go back and get them otherwise we are not interested"?

MR. HRUSKA: Excuse me; this is a system in which CBS has a per-use license?

MR. TOPKIS: This is a system in which CBS is free to deal with--

MR. HRUSKA: ASCAP?

MR. TOPKIS: Not ASCAP; with individual writers and publishers.

MR. HRUSKA: CBS has no ASCAP license?

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MR. TOPKIS: That is right.

MR. HRUSKA: Do NBC and CBS have ASCAP licenses?

MR. TOPKIS: No.

MR. HRUSKA: Nobody has ASCAP licenses?

MR. TOPKIS: That's right. Nobody has.

MR. HRUSKA: Okay.

A Yes, I would expect the producer to get those rights.

Q You would insist on it, as a matter of fact, wouldn't you?

A I certainly would.

Q And as a matter of fact, if you had a per-use license from ASCAP, but an ASCAP member and ABC and NBC also had such licenses, but the ASCAP member had the right at any time to withdraw any composition from the ASCAP repertory, you would similarly insist that the producer bring you a program with the rights already cleared, would you not?

A Yes.

Q So for all practical purposes, Dr. Stanton, would you not expect that in a world where there were individual negotations with song writers and publishers and there was also an ASCAP per-use license, the ASCAP

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A Yes.

Q What are they, sir?

A GUNSMOKE.

Q Anything besides GUNSMOKE?

A There may be some. No,not that we produce today.

Q Okay.

So we are talking about your news and public events productions?

A And I am talking network now.

Q Right. And that would be the area where you would expect to use the ASCAP per-use license. What kind of music use do you make on your news programs? Let's be specific.

What are your news programs? I will come to public events in a second.

A We start with the EVENING NEWS.

Q Is that the Cronkite show?

A That is the Cronkite broadcast. We have the 7:00 to 8:00 a.m. news, Monday through Friday.

We have a half hour of news, usually, on Saturday evening, a half hour on Sunday evening. We have a quarter hour of network news at 11:00 o'clock on Sunday, 11:00 p.m., that is.

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We have a brief news period around noon, Monday through Friday. Then, depending on how you wish to categorize them, you have broadcasts, such as, 60 minutes, an hour on Sunday, from 6:00 to 7:00 p.m. You have CBS REPORTS, a documentary hour that is in the schedule, not on a weekly basis, but on a monthly basis.

You have news specials that occur with regularity in the schedule. In addition to those that I have enumerated, you have special events, such as the APOLLO 17 LIFTOFF, and the progress on that flight. You have such things as we will probably happen shortly in connection with President Truman.

There are news broadcasts on Saturday morning for children.

I expect that when the final determination is made of the negotiations now going on in Paris come about, there will be another special broadcast on that just as there was on the day that Mr. Kissinger said, "Peace is at hand." That was a special that we broadcast in October. There are a whole host of special broadcasts which I do not have to enumerate any further, I am sure.

Q Right. So far as the news programs that you began by listing the CRONKITE SHOW, the 7:00 to

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8:00 a.m. show and so on, their use of music is more or less fortuitous, is it not? By that I mean that music is not a planned part of the program of a news show.

A Generally, the only way music gets into those broadcasts is by the reporter of an event. We don't use theme music on news.

The Cronkite half hour does not open and close with a theme or any background music, but if you were to pick up a public event in which there was music, yes, there would be that music. That is very infrequent, however.

Q And how about the show, the program entitled, 60 MINUTES? Does it make any use, regular, planned use of music?

A It does not; it does not. You hear the ticking of a stopwatch at the opening and close of that broadcast.

Q And CBS REPORTS, that is a monthly program you said?

A I do not want to testify to its scheduling, but it generally is on once a month.

Q Does that have any consistent music use pattern?

A It does not.

Q Again, then, music intrudes only as part of reporting an event?

A Yes, or on those occasions when the subject matter deals with the life of a composer or a musician

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there would be music, if that is the central theme of that particular broadcast. They are not considered musical broadcasts.

Q You spoke, Dr. Stanton, of a type of program that you called NEWS SPECIALS.

A Yes.

Q What would that mean, one of those situations where you get together four good reporters after an event and have them analyze it? Something like that?

A That would qualify as NEWS SPECIAL. For example, when President Nixon announced the economic controls we had a special broadcast about the application of those controls.

We also had a special broadcast when the President came up and made the statement. That would be considered a CBS NEWS SPECIAL.

Q And those news specials did not typically contain music unless, for some reason or another, and it would be a rare reason, it intrudes, is that right?

A That is right.

Q And the same is true, I suppose, of the special events that you referred to, such as the APOLLO 17 LIFTOFF, President Truman's illness, the Paris Peace

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reporting and so on?

A That is correct.

Q And the children's news programs, Doctor, Saturday morning, do they have any music?

A Typically, they do not.

MR. TOPKIS: Excuse me a second. I would like to confer with one of my colleagues for a moment.

(Witness conferred with counsel.)

Q You spoke, Dr. Stanton, of the GUNSMOKE program. That program is still produced by CBS?

A It is.

Q And it has theme music and background music I seem to recall, from the times when I have seen it.

A Yes.

Q Do you happen to know who it is who composed the background music?

A I do not.

Q And what about the theme?

A I am not familiar with that situation, either.

Q GUNSMOKE has gone into syndication under the title MARSHALL DILLON: is that right?

A That is correct.

Q I have been told that when that happened a

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THE WITNESS: Can you help me by defining what you mean by this?

MR. TOPKIS: Sure.

Q Is there any directive to your producers, or whatever, that you prefer to have April or Blackwood music used, or is there by contrast a directive that everyone at CBS and the business entities with which CBS has dealings shall blind himself to the identity of the publisher of music?

A The answer to the first part of your question is, that there is no directive to use April or Blackwood music under any conditions.

Q Doctor, I believe that the trend in recent years has been for CBS to do less and less of its own producing and that trend has resulted in a situation where GUNSMOKE is the only show that you produce; is that right?

A In prime time, that is correct.

Q Do you expect that trend to reverse or do you expect that GUNSMOKE will remain as your only production?

A This is not unrelated to FCC action which prohibits us from having interests in programs, and I would not expect there to be much change in the future. As it is now under the FCC regulations, we may produce the entire program, but we may not produce it with partners or

with others who have equities in the series. It is very difficult to see that we would be doing a lot of our own programming. We do some films that are in the schedule from time to time. But not as a regular series.

Q Doctor, you said before that you could not dredge history to recall why it was that you did not give very extensive consideration to the per-use idea in the mid-to-late 60s.

That is as I recall your testimony. I learn slowly.

Can you tell me what considerations influenced your judgment in deciding to go the per-use route in 1969?

A A strong belief on our part that we ought to try to make arrangements to relate the payments for music to the use of the music and a belief that we should be free to negotiate with songwriters and publishers for the use of music on a per-use basis.

Q And that all came to your attention in this conversation with Mr. Evans that you referred to earlier?

"All" is a very encompassing word. I have already indicated that the per-use idea was something that had been considered at an earlier time.

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Q But the only person you remember discussing the per-use idea with was Mr. Evans?

A That is correct.

Q Right. To your knowledge was any study or systematic inquiry made by CBS Television Network into the desirability of a per-use license?

A It may or may not have taken place. I am not familiar with it.

Q During the period of your restiveness, mid-to-late 60s, did you ever contemplate the possibility of seeking a reduced blanket rate from ASCAP by the technique of getting a number of direct licenses from songwriters or publishers and then contending that in consequence the blanket rate should be reduced?

A I did not.

Q I am addressing myself, of course, to the undesirability of what you call paying twice, and let me ask you: Did you consider any other technique to reduce paying twice or eliminating paying twice while still holding an ASCAP blanket license?

A I did not.

Q Did anyone at CBS, to your knowledge?

A Not to my knowledge.

Q Whose job would it have been to explore

the alternatives in this area? Would that have been Mr. Wood's or the head of the network?

A That responsibility would rest with a number of individuals, including Mr. Wood.

Q And who were the others, sir, his subordinates?

A I would expect people on his staff to be charged with that responsibility.

Q All right. We will be seeing Mr. Wood; we can ask him those questions.

Have you ever heard the term, Dr. Stanton, "Clearance at the source"?

A Yes.

Q What does it mean to you, sir?

A I am not sure I can tell you what it means, but I have heard the term.

Q Do you remember where you heard it?

A No.

Q Did you hear of a proceeding which NBC began a few years ago seeking an ASCAP license which would be limited to a stipulated number of compositions?

A Yes.

Q Did CBS contemplate the possibility of bringing such an action, consider the possibility ?

A No.

Q Was there some particular reason why you did not consider it?

A There may or may not have been. I am not familiar with it.

Q In any event you did not participate in the decision not to follow that route?

A That is correct.

Q On occasion, Dr. Stanton, did any CBS executive sit on the BMI Board?

A I don't recall and I could not answer that question without looking back over the records.

Q None comes to your attention immediately, at any rate?

A No.

Q Dr. Stanton, there came a time when CBS divested itself of its BMI stock. You remember that?

A Yes.

Q About when was that; do you recall?

A In the late 50's.

Q Late 50's. Did you participate in the decision to make that divestiture?

A I did.

Q Will you tell me the reasons that motivated it?

A When BMI was formed we made a modest investment

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in the organization. We were anxious to have BMI get underway and to that extent we participated in the formation of BMI. I didnot participate in any of these deliberations but I am reciting history to you now.

It seemed to me in the middle-to-late '50s BMI was off and running, and to avoid any possible criticism for our participation in it or any possible charge that we might be favoring BMI music over ASCAP music, a thing that we did not do, I thought the best course of action would be to retire from the scene and withdraw from our investment.

By that time, BMI was well underway and we had succeeded in our original aims.

Q Which were, I take it, to build a viable competitor for ASCAP?

A Yes. To give young songwriters an opportunity to become members of BMI, to have a repertoire of music that wasn't in the ASCAP catalog. There were a number of reasons for the formation of BMI.

Q When you divested yourself of your stock, you turned it back to BMI at cost, didn't you?

A I believe we did.

Q Did you consider putting the stock up for sale?

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A Having reached the conclusion that we wanted to pursue a per-use arrangement with ASCAP, I saw no reason to delay in requesting and expecting an affirmative answer.

Q Did you ever consider seeking a per-use license as to owned and operated radio or television stations at any time?

MR. HRUSKA: I object to the question. I direct the witness not to answer. The same subject that we had our difficulties with before.

Q Doctor, as to your television network, did you ever consider saying to the producers of programs, that is, outside producers of programs, "Get music performing rights for us when you submit a program to us" and then yourself taking a per-program license from ASCAP? Is my question clear, sir?

A It is.

Q Fine.

A I did not give consideration to such a plan.

Q Doctor, do you know that subsequent to the filing of this action CBS per its deputy general counsel, John Appel, Esq., sought ASCAP's fees for blanket and per-program licenses for its O & O radio stations?

MR. HRUSKA: May we see that letter, please?

MR. TOPKIS: Surely. And I will ask Mrs.

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head of the Broadcast Group was Richard W. Jencks. In the case of the CBS owned radio stations, the decision would have been made by Samuel C. Digges, president of CBS Radio Division, and again, by his immediate superior, Mr. Jencks, who was president of the CBS Broadcast Group.

Q Doctor, you testified a few minutes ago, as I understood it, that you regarded the decision to seek a per-use license from ASCAP as a major business change or something like that. When you were considering it, did you discuss with anyone the question of whether it ought to be an across-the-board change or confined to television network operations?

MR. HRUSKA: Same objection, same direction.

MR. TOPKIS: Very well.

Q Doctor, you testified last time, when I was asking you whether you had ever considered the possibility of going out and negotiating directly with copyright proprietors for performance rights, you testified that you couldn't do that in this competitive world.

MR. HRUSKA: Page?

MR. TOPKIS: Yes. Page 131.

Q You said at line 17, according to the transcript, that that would be unrealistic because your

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competitors would continue to have blanket ASCAP licenses. Do you see that?

A I do.

Q And you adhere to that testimony, do you not, sir?

A I do.

Q You thought and think that you would suffer an intolerable competitive disadvantage vis-a-vis ABC and NBC Networks; is that right?

A If NBC and ABC are operating under the blanket contract, yes.

Q Right, sir.

Now, would you tell me, please, Doctor, what is that competitive disadvantage that you would experience?

MR. HRUSKA: This is a situation in which CBS has cancelled its ASCAP license, NBC and ABC Television Networks have ASCAP blanket licenses, and CTN is attempting to fill its competitive requirements for music by licensing them directly from writers and publishers?

MR. TOPKIS: Yes, sir.

MR. HRUSKA: All right.

A In addition to the time involved in doing that, it seems to me that there are at least two other considerations.

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The first is that I have a very strong belief that there would be a disinclination on the part of writers and publishers to deal with CTN or the producers who would seek direct license arrangements; and second, there is no machinery for effecting those license arrangements. In other words, there is no sales organization on the part of the writers or publishers because they have always had the ASCAP and later the BMI system for representation.

If those factors came into play, and it is my belief that they would, then I believe that the broadcasts produced for CTN would suffer or could suffer from a creative point of view. If that became the fact, then ultimately CTN would suffer in the marketplace with advertisers and with audiences. Circulation would be impaired and as circulation was reduced, income would be reduced, as sure as night follows day.

Q So in the final analysis, you would lose money; is that your expectation?

MR. HRUSKA: I object to the form of the question. What do you mean by "final analysis"? Is there a period of time you have in mind?

MR. TOPKIS: When night follows day.

MR. HRUSKA: You mean immediate loss of

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money; is that what you are talking about?

MR. TOPKIS: No. I was picking up on Dr. Stanton's words.

A I would ask another question.

Q I accept help from everywhere.

A What do you mean by we would lose money? Do you mean we would lose money, we would lose income or would we go into the red as far as the corporation is concerned?

Q No, no. I thought you meant that you would lose income.

A Yes. I believe that we would lose income. I am not prepared to say in what time frame that would take place.

Q So to recapitulate, Doctor, these three disadvantages that you speak of or circumstances creating disadvantages, perhaps would be a better term, are time, the time that would be involved in seeking direct licenses; second, a disinclination which you foresee on the part of writers and publishers to deal with CTN or program producers; and third, the absence of a machinery for effecting license agreements.

Is this a fair summary of the three factors you have in mind?

A Yes.

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Q Okay.

MR. HRUSKA: Excuse me. Those are the factors leading to the consequences.

MR. TOPKIS: I understand.

MR. HRUSKA: You don't mean to outline the consequences?

MR. TOPKIS: That is right.

BY MR. TOPKIS:

Q You have no idea of how much time would be required, do you, Doctor, one way or the other?

MR. HRUSKA: Time for what? For negotiating licenses for a particular program?

MR. TOPKIS: Yes,sir.

MR. HRUSKA: Across the board, all programs?

MR. TOPKIS: Whatever Dr. Stanton meant.

MR. HRUSKA: You have to have a clear question before we can have a clear answer.

MR. TOPKIS: The clear question is based on the last clear answer which I understood perfectly. I will bet Dr. Stanton did, too, when he used the term.

A Will you repeat the question for me, please?

(Question read back.)

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A If you are asking me the precise time for a particular clearance or negotiation, I am not prepared to say what that time would be, I am not an expert in that area.

I do know this: That with the shift from blanket to per-use, when NBC and ABC were operating on a blanket license, we would be at a competitive disadvantage. It would take more time than it now takes.

Q Under a blanket license, it takes zero time, so any time would be more time; is that what you mean?

A Exactly what I said.

Q All right, fine, sir.

You spoke, Dr. Stanton, of disinclination on the part of writers and publishers. On what do you base your expectation that there would be such a disinclination?

A Essentially on the basis that I believe that publishers and writers would prefer to be a part of a central cartel arrangement in dealing with purchasers than they would to be in the open marketplace where there was competition for the use of their music.

Q But if you announced, as we hypothesize here, that you were not interested in dealing with any central cartel, but were interested only in dealing directly with writers and publishers, would you expect that the disinclination would continue?

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A I would.

Q That is to say, they wouldn't deal with you?

A I think there is a strong probability that many of them would not deal with us.

Q It is because of that fear that you list this as one of the circumstances which would ultimately cause a competitive disadvantage?

A Yes.

Q Have you ever tried to negotiate directly with a writer or publisher?

A I have not.

Q Has CBS to your knowledge?

A I think I answered that last week or earlier, and said that I did not know one way or the other.

Q Another world that we have hypothesized is a world in which CBS has won this lawsuit and has a per-use license from ASCAP. You are familiar with that hypothesis?

A I am.

Q Tell me, Doctor, would you expect that writers and publishers would be any the less disinclined to deal directly with CTN in that world?

MR. HRUSKA: This is as a result of a judgment in this action by this court declaring --

MR. TOPKIS: I don't know what it is a

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result of. I asked a fairly simple question it seems to me.

MR. HRUSKA: I think that is an important part of the question.

MR. TOPKIS: I am not interested in the addition.

A Would you please read me back the question?

(Question read back.)

A It is my belief that if we got the per-use arrangement we are seeking, that writers and publishers would be more inclined to deal directly with producers and CTH.

Absent that inclination, however, in the face of the arrangement we are seeking, I would expect other remedies if we weren't able to deal directly.

Q Why would you expect writers and publishers to be more inclined to deal with you directly in a per-use world?

A Than what?

Q Than in a world where you just didn't hold any kind of ASCAP blanket license and your competitors held ASCAP blanket licenses.

A It is my conviction that if we were granted the per-use contract, that over the course of time writers and publishers would be more inclined to deal with us than

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if we were to cancel our contract or not renew our blanket contract and try to go it on our own under the circumstances.

Q Can you tell --

A In the one case --

Q I'm sorry, sir.

A In the one case, the per-use case, it would be a formal recognition of the plan of operation. In the case where we were to cancel or not renew our contract, I think it would be a different set of circumstances as far as the writers and publishers are concerned.

Q How would the circumstances differ as you see it, Doctor?

A I believe in the first instance, if the per-use contract were formalized, that that would signal something to the writers and publishers that would not be signalled if we went on our own under a condition where we had no contract with ASCAP.

Q Would it be fair to say, Doctor, that you think if the per-use system had the imprimatur of a court decree, that is what would make the difference?

A That is one of the factors that would make the difference.

Q Any other?

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A Perhaps, but I believe the other answer I would give is related to the court's imprint on this arrangement.

Q Would it be fair to say, then, Doctor, that the basic distinction that you perceive is that if CBS just went on its own and dropped an ASCAP license, cancelled it, didn't renew it or whatever, and decided to deal directly, writers and publishers would regard that as a kind of testing out on the part of CBS; but if CBS went ahead and got a court decree ordering the per-use license, writers and publishers would tend to establish that as no longer a matter of testing out, but as a matter of declared principle?

A They may or may not look upon it as a testing out procedure under the court decree. I in no way am equipped to do more than speculate about that. It is my opinion that -- and here I am repeating -- it is my opinion that the court decree would make it a much more workable and practicable solution than going it on our own without any contract from ASCAP.

Q Because of this signal that you spoke of before; is that right?

A Yes.

Q Have you ever spoken to a songwriter, Doctor?

A I am sure I have.

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Q Have you ever spoken to a songwriter about business?

A Yes, even about business.

Q Can you recall one?

A Yes, but I don't believe it advances the cause to identify him.

Q Was it about the music licensing business?

A It was not.

Q Have you ever talked with a music publisher about the music licensing business?

A Would you please read that back?

(Question read back.)

A Yes.

Q Who was that, sir?

A We referred in our earlier meeting to April and Blackwood.

Q Right, sir. I will exclude April and Blackwood.

A The answer is no.

Q Would you agree with me, then, Doctor, that your expectation as to the inclination or disinclination of songwriters and publishers might fairly be characterized as speculation?

A Yes, speculation based on the experience in business

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over many years where I have found it unnatural for people to -- or unusual for people to turn in the direction where there is a possibility that they may receive less money in the open marketplace as against having an arrangement whereby the revenues are more certain through a combined selling organization.

Q In your business experience, Doctor, you have known situations, have you not, where people chose between combined selling operations and going it individually and chose the individual route?

A Yes.

Q And you have known situations where they have chosen the combined route?

A The only one that I have had any indirect dealings with in my experience in broadcasting, that I can recall, is ASCAP and BMI.

Q You have some experience with Columbia Broadcasting Television Network, haven't you, Doctor?

A Yes.

Q That is a combined selling operation, isn't it?

MR. HRUSKA: I object to the question. Don't answer it.

Q Wouldn't you say, Doctor, on the basis of your

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business experience, that people tend to follow the individual route or the combined route, depending on which they regard is likely to make them more money?

A Money is not the only consideration. There is a small matter of legality of being in a combine or cartel.

Q Sure. Those are the two considerations that normally guide people's conduct in your experience; is that right? That is, legality and profit? I will add public service, if you wish.

A I think you have to bring in the third.

Q Sure. All right, sir.

You spoke, Doctor, of one of the contributing factors to this competitive disadvantage which would result if you dropped an ASCAP license, any ASCAP license and your competitors continued to have ASCAP blanket licenses.

You spoke of one of the factors as being the lack of any machinery for effecting license agreements. Do you remember that, sir?

A I do.

Q What kind of machinery would you envisage existing under the per-use license arrangement which you seek?

A Here you refer to the machinery of the individual writers and publishers?

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Q Yes, sir.

A I would expect that over the course of time that the writers and publishers would have representatives calling on producers and CTN to make their music available to the producers and CTN.

I would expect that over a course of time there would develop clearing house arrangements where CTN and producers could go to effect the arrangements for catalogs or individual numbers.

Q How would those clearing house arrangements that you envisaged differ from an organization such as ASCAP or BMI?

A In a number of ways.

In the first place, there would not be a blanket contract. Your payments would depend upon use. The rates would be different for different uses, the rates may or may not be different for classes of music. And we would notunder the clearing house concept be prohibited from going directly to writers and publishers. The clearing house would be a convenience for the writers and publishers as well as the users.

Q Have you concluded, Doctor? I don't mean to interrupt you.

A Yes.

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Q Why is it, Doctor, that you would expect that such clearing houses would develop in a per-use world but wouldn't develop if you just announced that you were no longer dealing with ASCAP?

A For reasons which I have already stated, it is my opinion that writers and publishers, realizing that they would be in an open competitive market, and therefore might not receive as much as they would from their arrangements with ASCAP, would be disinclined to deal with us if we were to go direct without having the per-use contract.

I believe there would be every reason for writers and publishers to resist our efforts in that direction, hoping, thereby, to drive us back into the blanket contract arrangement with ASCAP.

Q You are currently paying, or you were paying in 1969, ASCAP four or five million dollars a year for a blanket license?

MR. HRUSKA: The record shows the figure is $5,680,000.

MR. TOPKIS: For 1969. Thank you, Mr. Hruska.

Q So in 1969 you had a plum of $5,680,000 to hang out the window. Wouldn't you expect that if you offered that sum to individual writers and publishers you

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might get a few people to break the firm ranks?

MR. HRUSKA: Would you explain how that sum would be offered to individual writers and publishers?

MR. TOPKIS: Surely. I will try to, at any rate.

I have been asking Dr. Stanton about what he would expect would happen if he dropped any dealings with ASCAP and offered to deal with individual writers and publishers and he has told me that there would be a disinclination on their part to deal with CTN.

And I am now asking him whether he wouldn't expect to overcome some of that disinclination if he offered to "incline" people with $5,680,000 per annum.

MR. HRUSKA: That is not my question. My question was: How do you offer a lump sum figure of $5,680,000 to the publishers and writers of music in the United States?

MR. TOPKIS: My respect for the bargaining capacities of the Columbia Television Network is such that ---

MR. HRUSKA: So what?

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MR. TOPKIS: -- I sit here confident that we would figure out a way. But if Dr. Stanton wants to tell me that they couldn't figure out a way, I will accept that as an answer.

A Could you please read the question?

(Question read back.)

A I have difficulty with that question because I don't know how you hang that plum out the window when you are dealing with a specific publisher or writer for the rights, performance rights, to an individual piece of music. It seems to me that you are going from a very big number to an individual negotiation and I have some difficulty with that.

Q Yes. I understand that you have difficulty with it. The difficulty really arises from the fact that it is all so uncertain; isn't that right?

MR. HRUSKA: I object to the form of the question.

A I'm sorry, I don't follow you when you say it is uncertain. What is "uncertain"?

Q What would happen in this world, either the per-use world or the no-license-from-ASCAP world, or any other world?

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A I think there are two different worlds we are talking about.

Q Yes. And they are both very difficult to speculate about, aren't they?

MR. HRUSKA: I object to the form of the question.

Dr. Stanton has already given you his opinion about both "worlds." I don't think you have to ask him whether it was difficult for him to render that opinion.

MR. TOPKIS: No, no. I am not doing that at all. I assure you I have too much respect for the Doctor's opinion. But I am trying now to understand -- well, I will leave off an explanation of what I am trying to do and instead just go ahead and try to do it.

BY MR. TOPKIS:

Q Doctor, when you think of having so much difficulty negotiating with people with $5,680,000 in your pocket, does your range of thinking encompass running an ad in VARIETY to the effect that you have that much money available to pay to songwriters and publishers and wouldn't somebody like to drop around?

MR. HRUSKA: I object to the form of the

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question. You may answer.

A You are talking now about the situation in which we would not have an ASCAP license?

Q Right, sir.

A And would not be operating under the per-use relief that we seek?

Q Right, sir.

A I haven't given discrete consideration to whether we would run an ad in VARIETY or not.

Q As a matter of fact, Doctor, you haven't given any consideration at all as to how you might proceed in such a world; isn't that right?

MR. HRUSKA: I object to the question. It assumes something that you have not yet established on the record. In fact, I believe the contrary has been established.

MR. TOPKIS: Could I penetrate those Delphic words and inquire what you mean?

MR. HRUSKA: Read the question back.

(Question read back.)

MR. HRUSKA: Dr. Stanton has testified about the effects and consequences of proceeding in such a world and I believe the literal language of that question presupposes the contrary.

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MR. TOPKIS: No, no. That is not what I meant. What I understand Dr. Stanton to be testifying to was how he would expect other people would behave in that world, namely, songwriters and publishers. They would be disinclined to deal with him. And now I am asking him, has he given any consideration to how he might overcome that disinclination, and I suspect that the answer is that he has given no such consideration.

But I will welcome any answer.

MR. HRUSKA: The question then is whether Dr. Stanton has given consideration to the methods by which CTN might attempt to overcome the obstacles which he specified before, namely, the disinclination of writers and publishers to deal and their lack of facilities and institutions to enable them to deal.

MR. TOPKIS: I will accept that as a rephrasing.

A Now, would you please read that back?

(Record read back.)

A Yes. General consideration has been given to how we might operate.

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Q By you, sir?

A In general terms, yes.

Q Have you discussed it with anyone?

A Yes.

Q When was this, Dr. Stanton?

A During that period when we were considering the request of ASCAP for the per-use contract.

Q With whom did you discuss it?

A With Mr. Evans.

Q In his capacity as your attorney?

A Yes.

Q You weren't seeking his business advice?

A No.

Q Did you seek anyone's business advice on how you might operate in a world where you didn't hold an ASCAP license?

A I did not.

Q You considered it yourself and in conversations with Mr. Evans. Now, when you considered it yourself, what was your thinking? How did you think you might operate in such a world?

A My thoughts at that time were more concerned with the problems of living in such a world than they were, really, with taking ads in VARIETY and getting into details of that kind.

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Q You saw problems in living in such a world; is that right?

A Problems which I have already mentioned.

Q Right. Did you try to think of any solutions?

A It seemed to me the course of action we were taking was a step in that direction.

Q Other than that? That is to say, did you think of solutions for these problems which would enable you to live in a world in which you did no more than stop dealing with ASCAP?

A It seemed to me the first thing we had to explore was getting a per-use contract.

Q No, Doctor, what I am trying to focus on is your consideration of the possibility of dropping any dealings with ASCAP and dealing directly with writers and publishers. I gather your testimony is that you did consider that possibility and I want to know whether you considered in your own mind any possible solutions to the problems that you envisaged in such a world.

A But I would submit that it would not make sense for me to continue to knock my head against a stone wall when I thought at least there was another solution to the problem.

Q So you didn't think there was a solution along

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the line of just dropping dealing with ASCAP?

A That is correct.

Q Okay, fine.

Doctor, you testified a moment or two ago that you would expect that a machinery, a clearing house machinery of some kind, would be established over time in a per-use world. Do you remember that testimony?

A I do.

Q Wouldn't you expect similarly that some kind of machinery would be established over time in a world in which you were no longer dealing with ASCAP and didn't hold a per-use license of any kind?

A I was under the impression that I had already answered that when I said that I thought the chances were much better for a per-use contract to work in the open marketplace than it would be if we were without a contract with ASCAP and were on our own.

Q So what you want here, Doctor, and please tell me if I sum up fairly, is a per-use contract of some kind with ASCAP and also the right to deal individually with writers and publishers?

A Essentially that is what I am saying.

Q So far as the per-use contract with ASCAP is concerned, could you sketch in for me some of the details

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A No. I do not. I would be guessing.

Q All right. To your knowledge, Doctor, does CBS have any particular policy as to the performance of serious music during prime time?

A We have no particular policy with regard to the performance of serious music during prime time.

Q You said earlier, Mr. Stanton, that you would think that under a system whereby you dropped dealing with ASCAP and sought to deal with songwriters and publishers directly while ABC and NBC networks retained the ASCAP blanket licenses, you would expect that ASCAP songwriters and publishers would be disinclined to deal with you.

Do you remember that testimony?

A I do.

Q Under a system or the system of a per-use license arrangement that you described this morning, would you expect that ASCAP members would be inclined or disinclined to remain members of ASCAP?

A It would depend upon individual circumstances. I would not want to generalize about the behavior of the writers and publishers if the per-use arrangement were set in motion.

Q Do I understand, then, Dr. Stanton, that you are

prepared to generalize about their behavior or their anticipated behavior in a direct licensing world, but you hesitate to generalize about their behavior in a per-use world.

A That is correct.

Q What is the cause for the distinction that you draw, sir?

A To generalize again, I suppose human nature. If we were to break away from ASCAP by not renewing our license, and ABC and NBC continued under a blanket arrangement, I have said and I continue to believe that there would be an inclination on the part of writers and publishers to want to remain within the ASCAP framework or if they did break away it seems to me there is a strong temptation on their part not to want to deal with us in the hope that they could drive us into the fold.

Money, I think, is one of the considerations that would lead them to behave that way. Now I make the distinction between that set of circumstance and the one in which the Court puts its stamp of approval on a per-use license.

And I go back to what I said about human nature. I think that there is a difference, basic difference, between those two sets of circumstances. This

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This is not to say, and I am not prepared to state a conviction on this point, but it is not to state that publishers and writers might not be tempted, even under the direct per-use arrangement sanctioned by the Court, that they might not try to gang up on us, so to speak.

I take comfort in the fact, however, that I have a strong law department and a strong legal representation and if that were to happen I think there would be other remedies that I can pursue.

Q You would expect, would you not, Doctor, to continue to have the same strong law department, the same strong and resourceful outside counsel and the same legal remedies available to you in a world featuring either a per-use licensing arrangement or a direct licensing arrangement?

MR. HRUSKA: I object to the question.

MR. TOPKIS: Not as to form. I noted that.

MR. HRUSKA: I was going to say preliminarily.

THE WITNESS: You see what I mean?

MR. DAVIDSON: Do you have only one objection, Alan.

MR. HRUSKA: On the ground that--to use the term under a direct licensing arrangement--

MR. TOPKIS: That certainly is not

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particularly in view of the objections you have interposed to my inquiring about radio and TV and O & O's, and the like, I will confine my question to television network licenses.

MR. HRUSKA: I thought you had meant to limit it to television network.

MR. TOPKIS: Yes. I think that is a fair limitation for the present time.

THE WITNESS: I assumed as much in answering the question.

Q Fine. Fine. Now will you answer the question that is now pending, Doctor, that is to say, would you expect to find available to CTN through ASCAP the works of the more successful songwriters and publishers?

A I have difficulty with the yardstick you are using for successful.

Q It is about as meaningful a word as inclination or disinclination. No more and no less.

MR. HRUSKA: I object to the form.

A I am not prepared to hazard a guess as to how or why the choices would be made about staying in or going out.

Q Very well. I will accept that. Do you happen

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to know Richard Rodgers, Dr. Stanton?

A Yes.

Q Would you expect that Mr. Rodgers would stay in ASCAP?

A I would not want to speculate about Mr. Rodgers.

Q Would you expect that Mr. Rodgers would be willing to sell his compositions at the same price as other members of ASCAP as might exist under a per-use licensing arrangement?

A Mr. Rodgers might very well choose to pull his music or certain of his music out of the pool and want to negotiate directly.

Q Let me ask you this, Dr. Stanton: In the per-use world that you envisage, what arrangement woulkd you propose be made as to newly-composed works, and so that the real meaning of my question may be clear to you, let me say that it is my understanding that as of the present time upon the instant that a member of ASCAP ceases composing a piece of new music, or upon the instant that a member of a foreign society affiliated with ASCAP ceases composing a piece of new music, under the blanket license that piece of music is instantly and automatically licensed for use by anyone holding an ASCAP blanket license.

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MR. TOPKIS: May we take a very brief recess now during which I will consult my colleagues and see how otherwise we can develop Dr. Stanton's testimony?

MR. HRUSKA: Surely.

(Whereupon, a short recess was taken.)

Q Just a couple of more questions, if I may, Doctor, and as I said to my colleagues, the disasters are on their heads.

We spoke this morning of it being a part of your proposed per-use arrangement that ASCAP members be free to withdraw their compositions from ASCAP in accordance with procedures that would be established.

Do you recall that testimony?

A Yes, I do. And--well, maybe you should ask the question.

Q If there is any addition you want to make to it, please feel free to.

A I want to be sure that under the plan I have in mind that you understand that if they withdraw the music vis-a-vis CBS, they would withdraw the music vis-a-vis NBC and ABC because then we would be in a non-competitive position if they did not.

Q So it would be part of your understanding that

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if a songwriter or publisher wanted to have his works licensed by ASCAP he would have to be willing to have those works licensed to all three major television networks, is that right?

A I think in the end, if we are successful in what we are asking for, I think in the end it will be even-steven across the board because I think if the per-use concept works for CTN, ABC and NBC will follow suit.

But in that interval between the time that the per-use grant is made to us, and ABC and NBC may still be on a blanket contract, if the publisher withdraws his music for CTN I would expect, under the concept that I have been discussing, that he would withdraw that music as far as NBC and ABC are concerned.

Q You would think it indispensable that he be forbidden to withdraw just as to CTN?

A That is correct.

Q Suppose ABC and NBCCdecided to continue dealing with ASCAP on a blanket basis, what would you envisage then as being appropriate, so far as CTN and the right of withdrawal on the part of an ASCAP member stood?

A I stand by my original answer.

Q That is to say that even though NBC and ABC wanted to remain blanket licensees, you would want ASCAP

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members forbidden from leaving their compositions in the ASCAP repertory, subject to the blanket license, if they withdraw those compositions as to CTN and its per-use license?

A Because this is a very critical question, will you please read that back?

(Question read by reporter.)

MR. HRUSKA: Let me object to the form of the question. I think the phrase "leave their compositions subject to" is a difficult one.

The concept you are getting at is whether Dr. Stanton would want any withdrawal of compositions from the ASCAP pool vis-a-vis CTN to be conditioned on a withdrawal vis-a-vis the other television networks.

That is the concept, isn't it?

MR. TOWNS: If they held blanket licenses, yes.

Q With that modification, Doctor, will you answer the question, if it be a modification?

A Will you read me the question again?

(Question referred to read by reporter.)

A Yes.

Q And you would regard that as an indispensable

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part of the functioning of a per-use license as you envisage it?

A Yes.

Q Let us suppose, Doctor, that a number of ASCAP's more prominent songwriter members withdraw their compositions from the ASCAP repertory for television network purposes and just by way of example, let me suggest a few to you:

Richard Rodgers, Irving Berlin, the Cole Porter Estate, the Oscar Hammerstein Estate, Henry Mancini, Burt Bacharach, Carly Simon, Bob Dillon--if songwriters of that degree of prominence were to withdraw their compositions as I had suggested from ASCAP per-use licensing, would you regard the per-use license system as workable?

MR. BROSS: Withdrawn as to all three networks or just CBS?

MR. ARENS: I said and meant from television network licensing.

A Am I correct in assuming that producers and packagers and networks would be free to negotiate with the men you just named?

Q Yes, sir.

A Or their representatives?

Q Yes, sir.

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A Then I would consider it workable.

Q Now let us suppose that they withdraw their compositions from licensing by ASCAP only to per-use licensees of ASCAP and left the compositions available for blanket licensing.

Would you then regard the per-use licensing arrangement as workable?

MR. HRUSKA: Who has the blanket and who has the per-use?

MR. TOPKIS: Our two good friends, NBC and ABC, we will posit as continuing as blanket licensees and that most beleaguered former friend, CTN, we will posit as holding a per-use license.

Q And my question is, what is the use of a per-use license in that circumstance?

A I believe my answer earlier, that I would not agree to that kind of a situation.

Q You would not want a per-use license in that situation, is that right, Dr. Stanton?

A That is right.

Q So, are you telling us that the only way a per-use license system could operate would be if your competitors were forbidden to take blanket licenses?

MR. HRUSKA: I object to the form of the question, specifically the phrase, "Are you telling

us."

MR. TOPKIS: How about if I said, "Do I understand you to say"?

MR. HRUSKA: I would pursue my objection.

Q Will you answer the question as best you understand it, Dr. Stanton?

A Will you read it, please?

(Question read by reporter.)

A I would not object to ABC and NBC having blanket licenses if the publishers and writers were required to pull their music for all three, if they pulled it on anyone.

Q But that would be the only condition on which you would be willing to have either ABC or NBC have a blanket license, is that right, Dr. Stanton? If you had a per-use license?

MR. HRUSKA: I object to that, to the form of that question. I think the substance of that question was answered by the prior question and answer.

MR. TOPKIS: I just want to leave no ambiguity and you will forgive this very limited repetition, I hope.

A I hesitate because the word "only" like the word "never" is final.

Q I do not want to pin you down, Doctor.

A I really stand by what I said earlier.

Q Just so there may be no misunderstanding between us, am I right in understanding you to say that it is an indispensable condition of the per-use licensing system working that if CBS has an ASCAP per-use license where ASCAP members are free to withdraw their works, then any blanket license held by NBC or ABC must be subject to the same condition?

A With regard to the removal of music from the repertory?

Q Yes.

A Yes.

Q Tell me, Doctor, why would you expect that NBC or ABC would take a blanket license in that circumstance or would you think that they would not?

A I don't know what NBC or ABC would do in that circumstance.

Q Putting yourself in their position, would it occur to you, as a reasonable business man, to take a blanket license where the license was of extremely uncertain coverage?

MR. HRUSKA: This assumes that a competing network has already obtained a per-use license with

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that sort of condition.

MR. TOPKIS: Yes. Of course.

THE WITNESS: I want to be sure that I understand where we are, because I think something you said doesn't jibe with what was asked.

May I hear the question?

(Question read by reporter.)

A In a sense I believe I have already answered you to that when I said earlier that I thought this thing would go across-the-board when granted, for one. The other two would follow suit.

Q So that the availability of the per-use license in your expectation would mean that no network would take a blanket license; is that it?

A In the final analysis, the answer is yes.

Q I figured so.

Tell me, if you would, Dr. Stanton, have you ever heard of any society which respects copyrights throughout the world where the blanket license is not used?

A I am only familiar with three blanket licensing organizations, ASCAP, BMI and SESAC.

Q You have never studied the subject of copyright licensing abroad?

A I have not.

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EXCERPTS FROM THE DEPOSITION OF JERRY VOGEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

(S.D.N.Y.)
69 Civ. 5718

- -x

September 12, 1972
10:00 a.m.

Deposition of JERRY VOGEL, a witness, taken by plaintiff pursuant to subpoena dated August 7, 1972, at the offices of Milton M. Rosenbloom, Esq., 250 West 42nd Street, New York, New York, before C. A. Michaelian, a Certified Shorthand Reporter and Notary Public of the State of New York.

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J E R R Y V O G E L, having been first duly sworn, was examined and testified as follows:

MR. BAKER: The only stipulation we wish to enter at this time is with respect to the signing of the deposition by the witness. It may be notarized by any notary in the State of New York.

MR. ROSENBLOOM: With the same force and effect as if --

MR. BAKER: With the same force and effect as if --

MR. ROSENBLOOM: As though signed--

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information from the trade papers.

Q Suppose on January 1st of next year, 1971, CBS cancelled its ASCAP license so that it could acquire no rights to music through ASCAP, and that the other two networks, ABC and NBC kept their ASCAP licenses so they were continuing to license through ASCAP; would you make more effort under these circumstances than you do now to solicit either the television network or the producers of its programs to use your music?

A On what stations?

Q On the CBS network, which would include--

A No, I would take them off the mailing list. You say you have no ASCAP license?

Q We have no ASCAP license.

A So I have to take you off the mailing list.

Q You would do that because they had no ASCAP license?

A That's right. But I hope it don't happen.

Q Would you make any effort to license them directly?

A No.

Q No, you would not. Can you tell me briefly why not?

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A I am a member of ASCAP.

Q Suppose a producer of-- suppose the producer of Hawaii Five-O, which is a CBS television network program called you and said that he would like to use one of your works in one of his programs and that it would be broadcast over the CBS network and that he would like to obtain from you a license to perform.

He told you that normally if CBS had kept its ASCAP license that this wouldn't be necessary but now that CBS has cancelled its ASCAP license it is necessary for him to obtain the license directly from whoever is authorized to license it.

Would you try to negotiate a deal with him?

A I can't answer that.

Q Because you just don't know what you would do?

A Well, I am up a tree there. I am heartbroken that CBS went out but I can't answer that. Because it happened once before years ago with radio, they went on strike the three of them.

Q That was in 1940, I believe it was?

A That's 31 years ago, 32 years ago.

Q But at that time ASCAP had the exclusive right to license the music, I believe, of its members and today the members have a right to license directly.

I mean that was one reason why you couldn't do it in 1960. What would be the reason that you wouldn't do it today?

A Well, you are asking me to put the cart in front of the horse. I can't answer that. I couldn't tell you that. That is too far ahead to see what is going to happen.

Q Suppose CBS cancelled its license today and tomorrow the producer called you?

A I couldn't answer that. I don't think -- I would have to stick with ASCAP. I think most of the people would have to stick to ASCAP.

Q Why is that?

A Well, we know what we got, we don't know what we are going to get.

Q Suppose someone from CBS came to you and said, "We would like to license" -- they make the following proposal: They say, "We would like to negotiate a contract with you, and under this contract we would have the right to use any of the

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compositions in your catalog at a rate to be negotiated between us without getting prior approval,' and that they would remit payments in accordance with the schedule in the contract quarterly to you, or, if you wish, they would remit the publisher's share to you and the writer's share among the writers in accordance with whatever figures you gave them; would you be willing to at least attempt to negotiate what kind of arrangement?

A I don't think so.

Q Because you--

A The writers, how can I talk for the writers? For instance, Mrs. Norton, I can't tell Mrs. Norton what to do. She is getting an income from ASCAP.

Can I tell her what to do?

Q But if CBS had cancelled its license presumably they wouldn't use any works in the ASCAP repertory unless they got the rights from the publisher or the writer.

A Well, we got the other two networks.

Q That's right, you would get revenues from those.

A That's right.

Q So you wouldn't carry on negotiations with them?

A I couldn't answer you.

Q Because you know what you are getting from ASCAP and you don't know what you would be getting from--

A No, I don't want to be another Edward P. Marks Music Company. I don't want to be an outcast like he did. He joined BMI and he kept going down and down and down.

Q This was during the 1940 music strike, wasn't it? Yes. He eventually came back to ASCAP, did he?

A Not Marks. He bought a couple of companies out and he got in through those companies. He is still with BMI.

Q So that rather than having your works performed on CBS you would just wait and take the revenues from ABC and NBC and--

MR. ROSENBLOOM: I don't think that is what he said.

MR. BAKER: I'm sorry.

MR. ROSENBLOOM: As I understood what he said, he said he doesn't know.

MR. BAKER: Whether he would make a deal with CES or not?

MR. ROSENBLOOM: Because it is based on something in the future which might or might not happen.

MR. BAKER: And I guess I tried to shorten that future time by saying suppose this happened tomorrow.

MR. ROSENBLOOM: Yes, but your question is still based on suppositions and for that reason you are supposing something in the future that might or might not happen, and if it did happen then Mr. Vogel would be called upon to make a decision but he is not called upon to make a decision until such time as that happened.

And so it would be pure speculation on . what he might do. It would depend on a lot of elements that are unknown at this time.

Q Do you have any idea at this time what kinds of things you would want to know in making such a decision?

A Well, don't forget, I am 75 years old. I don't know how long I am going to ~~stay in New York~~ be alive so I don't want to jazz the thing up. So I don't

want to give you an answer.

Unless the three networks get together with ASCAP like they started BMI and this time ~~you~~ They start ~~the 42nd Street~~ another Company and they boycott us again

Q I am saying they rely solely on dealing with publishers directly without going through ASCAP.

A I can't answer that.

Q Let me ask you if you would be concerned about certain kinds of things.

Would you feel it necessary to consult with the writers of the works in your catalog before undertaking this kind of--

A Well, I don't think so. I don't know what they are getting and I know what I am getting, that's all.

Q Would it make any difference to you if CBS was willing to pay you a lump sum fee as an inducement to enter into this agreement; in other words, to assure you that you would have a certain amount of money coming in?

A Every year?

Q Either spread over five years or ten years or just a lump sum right at the beginning?

A Well, a lump sum I wouldn't be interested

in in the first place. And the other I couldn't, I don't know, we are again putting the cart before the horse. I can't answer you.

Q Would you be concerned about the problem of monitoring in a situation where you were not licensing through ASCAP as I have described?

A Well, I don't think I would worry about that, no.

Q You would be willing to take the reports from CBS as to what they had performed?

A I would take it from anybody, but my heart is in ASCAP right now.

Q Let's try a little different fact situation. Suppose there were no ASCAP, that there were no central licensing agency such as ASCAP, and the only way to license works to the network was by negotiating directly with CBS program producers, the producers of those programs.

A You see, if there is no ASCAP that would be ABC and NBC, all three of them.

Q That's right.

A Well, if you buy ASCAP out, then I have to go with you but if you don't buy ASCAP out, I don't go with you.

MR. ROSENBLOOM: May I ask what the question was?

MR. BAKER: The question was, suppose there was no ASCAP.

MR. ROSENBLOOM: I didn't hear the end of the question.

Suppose there was no ASCAP?

MR. BAKER: Yes, then the question was, would you then be willing to negotiate with the producers of CBS programs for the use of music in your catalog on those programs.

MR. ROSENBLOOM: Was there an answer?

THE WITNESS: I answered that question, didn't I?

Q Yes, I think you did.

A I answered the question.

Q You answered it by saying that if CBS bought out ASCAP but I am trying to hypothesize the situation where there never was an ASCAP. Where there is no ASCAP. There is no BMI.

A Well, I can't believe in that. I can't believe in that, what you say.

Q You can't conceive of that?

A No, because I know it is there and I have

been a member for so many years, say 40 years.

Q Suppose the Court issued an injunction which prohibited ASCAP from licensing ABC, NBC and CBS?

A I can't answer that. I don't think it will happen.

I have to put it I can't answer it and I don't think it will happen.

Q But you have no opinion as to whether-- you have no knowledge at this time as to whether you would be willing to negotiate with the CBS producer under these circumstances?

A You want me to say something about CBS, I don't want to say anything wrong to CBS. I don't want to put in the deposition anything about CBS. I am not happy with CBS, they don't go out of their way to help me. They kick me around.

Is that what you want me to say? I have to say that but you keep harping on CBS, CBS, and I am telling you the truth. You want me to say CBS treats me like a king? They don't.

Q Frankly, I have no idea.

A I know you don't. But I am telling you they don't do anything for me.

MR. ROSENBLOOM: Let's stick to the question.

THE WITNESS: He is repeating the same thing over again. I tell him I can't think of changing ASCAP right now unless they go out of business. They are not going to go out of business unless CBS buys them out with the other networks. They say,' Well, we are going to own the Association.'

Q I wasn't thinking about negotiating with CBS in this last question. I was thinking about negotiating with the producers of CBS programs which are people like subsidiaries of Warner Brothers, independent producers on the West Coast, Leonard Sheldon is a name that springs to mind. I don't know whether he does CBS programs or somebody else's. Or let's say would you negotiate with the producers of NBC programs? There is no magic in the fact that theyare producers of CBS programs.

A Well, you want me to fix my imagination too far. I can't go that far with you. I can't answer that.

Q You just have no idea of what you would do in that situation?

A Right now I have got to wait and sit and see what happens.

Q At the present time you do, through the Harry Fox organization, negotiate with motion picture producers, or you quote prices?

A License?

Q Yes, a license. The people who are producing motion pictures are in many instances similar to those who are producing television programs?

A That's right.

Q Would you tell me what is the difference between dealing with the motion picture producers and dealing with the producers of television programs which creates this great uncertainty for you?

A Well, the motion picture thing we have been doing it since the talking pictures business. The television thing you only do now, this proposition.

Q And when ASCAP decided to stop licensing motion pictures in around 1948, 1949, 1950, at that time you didn't know how you would do it? Is that--

A Didn't know at that time what to do, no. But it worked out all right.

Q Do you think that the difficulties of carrying on transactions with producers of television

programs would be any greater than those involved in carrying on transactions with motion picture producers?

A Well, I really can't answer that but I notice that the TV producers on the Coast, they are all in the publishing business. They have all got publishing firms, too.

Q But there might come an occasion when they need a song like "Take me out to the ball game"?

A So they come to me.

Q They come to you?

A That's right. And we license it through Harry Fox. They just say "We are going to use three minutes to chorus," so give them a price.

Q And does the price vary from composition to composition?

A Oh, sure.

Q Does it vary with the kind of use that they plan to make of it?

A What?

Q The type of use? You know, three minutes of the chorus or --

A Yes, singing or instrumental. Yes, I would say so.

MR. BAKER: Off the record.

(Discussion off the record.)

Q At the present time the kind of license which ASCAP issues to the networks--

A Is what?

Q The type of license which ASCAP issues to the networks--

A Yes.

Q -- provides that they shall pay a fixed fee for the right to use all of the copyrighted musical compositions in the ASCAP repertory --

A Their catalog.

Q Their catalog, the ASCAP catalog, and they may use them as few or as many times as they like. That is the way the present license reads.

Suppose that the Court issued an order to ASCAP which said that you shall grant CBS a license which provides that CBS shall make payments to ASCAP based upon the number of compositions which CBS uses, and the frequency with which they use those compositions; or, to put it another way, based upon the number of performance credits which are generated by CBS use.

So now CBS has a license whereby they are

paying an amount which is tied to the amount of music they use from the ASCAP pool.

A CBS producer or an ABC producer - let's assume that ABC has the same type of license, an ABC producer comes to you and says, "I would like to license one of the works in your catalog, in the Jerry Vogel catalog; would you quote me a price on it?" Would you be willing to quote him a price on it?

MR. BLUMSTEIN: Have you finished with the question?

MR. BAUER: Yes, I am.

MR. BLUMSTEIN: I would like the record to note my objection to the form of the question.

THE WITNESS: Do you want me to answer that one?

MR. BLUMSTEIN: Yes.

A I don't think I can answer that. You are reaching out for something that isn't here yet. And I can't answer that. As I say, I am the second witness, the third witness, and you want me to give my opinion and I am going to lay the law for ASCAP? You want me to lay the law for ASCAP? I can't lay the law for ASCAP.

Q I am not asking you to lay the law for ASCAP.

A I am the third person that you--

MR. ROSENBLOOM: If you feel you can't answer it, that's enough.

THE WITNESS: I can't answer. I can't answer.

MR. ROSENBLOOM: All right.

Q And the reason you can't answer it is because you just don't have any idea what you would do until you were actually presented with that situation?

A Until I see what happens with ASCAP.

Q I have a little trouble with that.

What sort of thing would happen with ASCAP? I mean--

A You put them out of business. CBS puts them out of business.

Q CBS puts them out of-- no, no, they are still continuing to license radio stations, television stations, wired music services the same way they do now, and they continue to license television networks except that if the television network program producer cannot negotiate a license directly

with the publisher of the work then CBS will license it through ASCAP.

So I don't see them as being put out of business.

A I know but we are reaching to something I can't answer. It is not my end. If you ask me about my songs I can talk. But I can't talk about ASCAP and what they are going to do.

Q But I wasn't asking you what they are going to do. I was asking you in this circumstance if you knew what you would do or--

A I have to see what other publishers do. I don't want to be the leader. I don't think I am big enough to be the leader.

Q So that if nobody else did anything and continued to have all of their works licensed through ASCAP you would tend to go along?

A I probably would.

Q Suppose that ten of the leading publishing companies in New York started licensing CBS directly, CBS producers directly, would you then be more inclined to start talking to producers of those programs if they called you up?

A No, ten publishers. I don't think so, no.

Q Suppose there were 50 big publishers, if there are 50 big publishers?

A There aren't 50.

Q How many are there?

A Well, we call it the Big Ten or something like that. About ten big companies. They are all owned by picture companies.

Q And if they are owned by picture companies and picture companies are the producers of many of these programs, they might well license direct. and if they did you still wouldn't license directly?

A I don't knowwhat I would do yet.

Q Suppose the ten biggest publishers in Amer negotiated an agreement with CBS which provided that CBS would use any of the works in their catalog at any time it wanted to and that CBS would make payments to each publisher in accordance with the schedule set out in the contract, and that as a result 50 per cent of the music used on CBS was directly licensed from these ten big publishers, would you give any consideration at that point to negotiating a similar license with CBS?

A No, I don't think so. They have enough with their own sothey don't need me.

Q I take it that you have not given any thought then to what you would do if ASCAP were enjoined from licensing the networks?

A I had no reason to. You are the first one to bring this subject up now. I have never read it in the papers, the trade papers or anything. So you are just starting something new now.

Q Are you generally aware of the terms on which ASCAP presently licenses music?

A Not altogether.

Q Could you tell me what you do know about it?

A Well, all I know is that when Arthur Godfrey was on the air he went coast to coast and maybe got 200 stations on radio, 200 points.

Now, if you take-- say you have Johnny Carson's Show and he was on night time and somebody got on maybe it would be 350 stations, 350 points.

And all I know is that we go for so many points. I used to do very well, but since rock and roll, since CBS and NBC are in the rock and roll business, big, ASCAP has fell down a little bit.

Q I was thinking more in terms of the basis upon which payments are made by the networks to ASCAP.

A That's fell down.

Q But what I am talking about is-- well, I will make it simple:

Were you aware that ASCAP issues a blanket license to the networks?

A Yes, I was, but I never saw it, I never asked for a copy.

Q But you were generally aware of that fact?

A Yes, I was doing very well so I didn't have a word to say.

Q Do you recall how you became aware of that fact?

A Well, my points went up. My promotional letters brought me a lot of points and I was tickled to death. But now in the last six years it just keeps going down and down and down because you don't program music, now all of a sudden you are anxious to get my music. I don't know why but there is some reason behind you.

Q Really what I think CBS is interested in getting is the right to deal with you rather than dealing through ASCAP.

A But I have the writers. I just can't spoil the writers' living either, can I?

Q Would it spoil the writer's living for CBS to deal with you--

A I think so.

Q You think it would reduce the revenues even further?

A Not only the revenue, the prestige. The prestige. There is a little prestige. In other words, if a song drops dead and it never sells any more, like the Irish music is not being played any more, I think ASCAP would take care of the widow and give them something, you know, and say, well, we have got a fund for that. Your music is no good no more, don't play it on the air any more, we will give you something.

Q This is the distribution plan by which they spread the writer's income over a period of years?

A I don't know how the writers work at all. I don't talk to writers. I don't know what they get. The old man I used to know a little bit about, the new man I don't know.

Q Do you think that the price of music would go down, the revenues of your company would go down if CBS started dealing directly with publishers?

A Oh, sure.

Q Why would that happen?

A Well, you are not using much music now on your networks. You are getting ready to have another war or something. I couldn't tell you.

Q But you do think the price of music would go down?

A Yes.

Q Would this be at all because you were doing the negotiating instead of ASCAP?

A I think so.

Q At the present time it is my understanding that if the song Melancholy Baby were played over CBS over 200 stations as a feature performance that you would receive the same amount in distributions as if any other song were played over CBS.

A That's right.

Q As a feature performance. Would you expect the prices for feature performances on CBS to be the same if CBS were negotiating directly with publishers?

A I can't answer that. You put me in a spot, I can't answer it.

Q Assuming that you had made the decision to deal with CBS for whatever reasons would you

quote different prices for different uses?

A No, same price, same as ASCAP.

Q Yes, the same as ASCAP, the same as the ASCAP price?

A I think so.

Q You wouldn't charge more for Some of These Days than you would charge for Melancholy Baby?

A No, the same.

Q For the same use?

A Same.

Q And if they didn't want to take it you would just say, "Goodby"?

A No, I wouldn't say goodby. I would say next time. I can't afford to fight. I just have to be nice to them. But I can't let them have it for nothing.

Q At the present time ASCAP under the consent decree must issue CBS a per program license. Under this kind of license CBS would pay ASCAP only with respect to those programs on which it used ASCAP music which it had not licensed directly from the owners of those compositions.

Thus, there would be some programs with respect to which CBS producers, or CBS, might try to

license all of the ASCAP music for the program directly.

Under those circumstances would you be willing to negotiate with ABC television producers for the right to license music on a program which was destined to be broadcast on CBS?

MR. HEIMSTEIN: I will object to the form of the question.

A My answer is I don't think so.

Q Can you tell me why you would not?

A Well, I know what I have got and as I say it is just lucky that I have that extension and I am not going to look for any trouble. At 75 I am not looking for trouble.

Q What kind of trouble would you expect?

A Well, I want-- if I want-- if I can continue to do what I do, I love what I am doing, if I can continue I would be very happy. And if I can't do it, I might as well close up the place, that's all. Right now I am happy the way it is going, but I hope it comes back some day.

Q Suppose CBS refused to take an ASCAP license and most of the other publishers started dealing with CBS directly, licensing directly, and you came

to the conclusion that the only way to get a share of this was to be willing to license directly also.

Would you have to hire additional personnel in your office in order to carry on this additional activity?

A There is no way-- I can't answer it in the first place but I-- it would mean more policing. I can't police it. I don't get a chance to look at the television myself.

Q Suppose AFMP agreed to continue to police them and report to you--

A AFMP does report to me.

Q But under this situation where all of the publishers were dealing with CBS directly--

A All of the publishers?

Q Yes.

A We are too fragmented, I can't answer. All the publishers? Maybe one will come in but I don't think all of them. Maybe another Marks will come in but I don't think so.

MR. BAKER: Off the record.

(Discussion off the record.)

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EXCERPTS FROM THE DEPOSITION OF NED WASHINGTON

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW York

- - - - - - - - - - - - - - - - - - - x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

(M.E.L.)
69 Civ.5740

- - - - - - - - - - - - - - - - - - - x

February 15, 1973
11:05 a.m.

Deposition of NED WASHINGTON, a defendant, pursuant to notice at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, New York 10005 before Leon Zuck, a Certified Shorthand Reporter and Notary Public of the State of New York..

APPEARANCES

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-and-

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BY: BERNARD KORMAN, Esq.,
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RICHARD WILE, Esq.,
of Counsel.

...

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties that the within deposition may be signed before any officer authorized to administer an oath.

...

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE N.Y. N.Y. 10007

NED WASHINGTON, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY

MR. HRUSKA:

Q Could you state your name and address for the record, sir?

A My name is Ned Washington. 1712 Angelo Drive, Beverly Hills, California.

Q Have you ever testified before in any proceeding or trial?

A In one trial, in 1958.

Q What was that?

A It was a personal case. It was nothing to do with this.

Q Have you ever given any depositions before?

A In that case I did.

Q Any other case?

A No.

Q Have you ever signed any affidavits?

A Affidavits? I don't think so. Not that I recall.

Q Other than music or lyrics for music, have you ever written anything that was published?

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the question.

Q Has there been a reduction in the publication of sheet music as far as you know?

A In the publication of sheet music?

Q Yes, sir.

A I wouldn't know.

Q Do you think phonograph records are more important in the music business today than they were say in 1930?

MR. TOPKIS: By more important, do you mean do they generate more dollar sales?

Q All right.

A I would have to see the figures to know that but years ago the record industry was a very big part of our business, going way back.

Q And you have no impression right now as to whether it has grown in importance?

A Without the figures I wouldn't know.

Q Do you elect to receive ASCAP distributions on a current performance basis or on a Four Fund basis?

A Four Fund system.

Q What in your judgment are the advantages of that system to you over the current performance

system?

MR. TOPKIS: What difference does it make?

MR. HRUSKA: I think it is quite relevant.

MR. TOPKIS: I would like to hear the pertinence to this litigation.

MR. HRUSKA: I don't want to run the risk of coaching the witness.

MR. TOPKIS: Well, then I will direct him not to answer until I have some indication-

MR. HRUSKA: If you would like to step outside with me, I'll explain it to you.

MR. TOPKIS: Fine.

Excuse us, please.

(Discussion outside the presence of the witness.)

MR. HRUSKA: Could we have the last question?

(Question read.)

A When I joined ASCAP, that was the only system, Four Fund system. As years went on I found myself satisfied with that system; the advantages I believe are that if I should have a dry period for two years I won't suffer as greatly as if I were

under a current performance system, where if I had no performances, I would have no money.

Q Suppose you are offered by ASCAP the option of going on a current performance basis in ASCAP distributions with respect to the performances of your music on the CBS Television Network and remain on the Four Fund basis with respect to all other ASCAP licensee uses of your music, would you elect that option?

A I don't know. It will take a lot of thought.

Q Would you consult with anybody regarding whether you would elect that option?

A I would consult with my attorney. I would consult with my business manager and I would consult more with myself about it.

Q What factors would you take into consideration, if you can answer that now?

A This would be a whole new way of functioning for me which I had never encountered before and it would be a new world as far as I am concerned and I don't know how I would handle it and what factors I would consider.

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SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

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permitted the use of your music to be licensed on a royalty-free basis?

MR. TOPKIS: What does that mean? Licensed by whom, performed by whom?

Q By any user of music who is making a public performance for profit?

A Well, I think it was the policy of ASCAP for years to exempt certain charitable organizations and churches--

Q I mean apart from that.

A Apart from that?

Q Yes.

A Only one occasion and that's been recently within the last few weeks when the Australian Government asked permission to include the lyrics of High Noon in one of their textbooks of their schools.

I thought this was good public relations and I did let them have it without charge, the lyrics. It was for educational purposes in the schools.

Q Has any of your music ever been licensed directly either by you or one of your music publishing companies to a broadcaster?

A No.

Q Do you know of any writer of music or publisher of music who has ever issued a direct license to a broadcaster?

A Not to my acquaintance, no.

Q Do you know of any broadcaster which does not hold an ASCAP license?

A No, I do not.

Q Let's suppose that none of the television networks held an ASCAP license and suppose further that a representative of the CBS Television Network approached you and asked you for a royalty-free license for the Carol Burnett Show, what would be your reaction to that request?

A For a performance of a song of mine on the Carol Burnett Show?

Q Yes, sir.

A You say if they asked me for a free license for it?

Q Right.

A I'd have to say no.

Q Suppose they were willing to pay you $100 for a license and they told you it was just one of the songs that Carol Burnett was going to sing on

next week's program?

A $100?

Q $100.

A I'd have to say no.

Q Would you be concerned about cheapening your music in issuing such a license for $100?

A Would I be concerned about cheapening my music?

Q Yes, sir, your compositions.

A It wouldn't be cheapening it in the eyes of the public but it would cheapen it in my estimation of it.

Q Do you think this might affect your bargaining position with respect to NBC and ABC, that is, if you gave CBS a license for $100?

A I have never given a thing like this any thought so I don't know how to answer your question.

Q I am sure you have not given it thought, sir. Of course, it's never happened. But maybe we can just point out one or two more questions.

You are approached by CBS, they offer you $100 for performance rights license for the Carol Burnett Show and there is also the potential that

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A I just don't know the answer to that question.

Q Let's suppose that ASCAP got out of the business of licensing television networks. In your judgment, would that be good or bad for you?

A It would be bad for me.

Q Why is that, sir?

A Because they performed this function all through my career. It would be a very upsetting thing for me personally and I think it would be an economic hurt to me as well.

Q Do you think it would be good or bad from the standpoint of the music industry?

MR. TOPKIS: I object to that question as a matter of form and direct the witness not to answer.

Q Could you describe the benefits of ASCAP membership?

A The benefits of ASCAP membership?

Q Yes, sir.

A It would take three or four days to do that.

Q Could you just outline the basic points?

A I think it protects the writer of works for the public. It gives him a feeling that there

exactly. I have had a long career and --

Q I understand. I understand.

Have you had any consultations with publishers regarding the fees that they would charge for mechanical rights licenses to your music?

A No.

Q Have you given any instructions to your publishers regarding the fees they are to charge for synchronization rights licenses to your music?

A No.

Q Or performance rights licenses?

A No.

Q Have you indicated to them that they were free to act without your approval as long as it was over a certain level?

A No.

Q Have you ever indicated any level to them?

A No.

Q Can you recall any specific discussion that you have had with a music publisher regarding the grand of a synchronization rights license to your music?

A Not at the moment, I can't recall.

Q Do you have any impression as to how many such conversations you might have over the course of

a given year?

A No.

Q Roughly?

A No

Q Could you put a range on it, you know, like it's got to be over ten or --

A No. It might happen three times in one year and none in the next year.

Q There have been occasions in which publishers with whom you are associated have granted synchronization rights licenses without consulting with you?

A Yes.

Q And the same would be true as to performance rights licenses for motion picture companies?

A Performance rights licenses for motion picture companies?

Q Yes, sir.

A We don't collect from motion picture theatres so just how do you mean that?

Q You do collect from motion picture producers. Music publishers do grant combined performance and synchronization rights licenses to motion picture producers. It is usually in one instrument, one document. But it includes both

rights.

MR. TOPKIS: What is the question?

Q The question is whether there have been occasions in which music publishers have granted motion picture performance rights licenses to motion picture producers without consultation with you?

A I have no personal knowledge of this.

Q But apart from whatever your contract with a publisher might say, you have not given any instructions to publishers that they should not license performance rights or synchronization rights to a motion picture producer without your approval?

A No, I have not.

Q Have you ever had any association with the Edward B. Marks Publishing Company?

A I don't think so.

Q Suppose, Mr. Washington --

A Suppose, you said?

Q Right. Is that a key word in your mind?

A No, I didn't quite hear the word.

MR. TOPKIS: Just in your vocabulary.

THE WITNESS: I didn't hear the first word, that's all.

Q Suppose --

A A hypothetical question.

Q We all know.

Suppose the CBS Television Network cancelled its ASCAP license and that the NBC and ABC Television Networks continued to hold ASCAP licenses.

Would it be your hope that the CBS Television Network could be persuaded to come back to an acceptance of the ASCAP license?

MR. TOPKIS: Come, come, come. That is about the silliest question I ever heard and this case has tested my capacity to appreciate silliness.

MR. KRUSKA: You are brave.

MR. TOPKIS: That's true. I am also long suffering but at this point, I draw the line.

I will direct the witness not to answer that question. He didn't come from California --

A On advice of counsel, I will not answer the question.

Q What would your reaction be to the cancellation by the CBS Television Network of its ASCAP license?

MR. TOPKIS: Tears.

Look, Mr. Washington unfortunately is a sick man. He has had two heart attacks. He has come

here because he has been named as a defendant in this action.

I am not going to sit here much longer and listen to such questions put to him. He has better things to do with his time.

I direct you not to answer that question, Mr. Washington.

BY MR. HRUSKA:

Q What do you believe would be the reaction of the ASCAP board to such a development?

MR. TOPKIS I direct you not to answer that question.

MR. HRUSKA: Am I correct in assuming that you will direct Mr. Washington not to answer any questions regarding developments that might occur in his judgment in the event that the CBS Television Network cancelled its ASCAP license and the NBC and ABC Television Networks retained their ASCAP license?

MR. TOPKIS: You put your questions and I will give appropriate directions. I don't want to unduly circumscribe you. I will not acquiesce in wasting of his time.

MR. HRUSKA: You have just objected to two questions that go fairly close to the heart of

this lawsuit.

MR. TOPKIS: The heart seems to migrate with about the frequency of flotsam and jetsam but go ahead.

MR. HRUSKA: I do wish you would study a little more.

BY MR. HRUSKA:

Q In your judgment, Mr. Washington, would the long range interests of ASCAP members be served as well as it is now served if the CBS Television Network operated indefinitely without an ASCAP license?

MR. TOPKIS: If he can possibly answer that question, I have no objection. Just to show you how cooperative I am.

THE WITNESS: May I hear the question again.

MR. HRUSKA: Why don't you read it back.

(Question read.)

MR. TOPKIS: About as long as the long term interests of Cravath, Swaine & Moore.

A Would the interests be served as well for the members of ASCAP?

Q Right.

A I hardly believe so.

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with each other, about the frustrations and disappointments.

MR. TOPKIS: American Society of Composers, Authors and Paranoids.

THE WITNESS: I like that.

Q Can you recall any specific discussions you hadregarding the licensing of 3M?

A Just over luncheon table, somebody says, "How about that 3M deal, what are we going to do about that?"

Somebody will say, "I don't know what we are going to do about that. We will have to explore it."

That would be the end of the conversation.

I might hear it two months later again. A casual manner. That's about the size of it.

Q Do you recall any discussion regarding 3M at an ASCAP board meeting?

A Yes, I remember a discussion.

Q Do you remember approximately when it was?

A I wouldn't know what date it was, no.

Q What do you recall about the discussion?

A I think our counsel called our attention to the fact a situation had arisen and there was

some discussion about it. It didn't cause any great waves of any kind, as I recall it. It didn't cause any great waves with me.

What was in the minds of the rest of the people I don't know but it was not an exciting thing, I would say that.

Q Do you remember what your counsel reported to the meeting on this subject?

A No, I couldn't give you the whole substance of it. I know it was brought up and discussed for a few minutes and some comments made on it. Then counsel answered some questions. It just seemed to die right there at that time, when it was first brought up at the meeting that I was at. I don't attend all meetings.

Q What was the tenor of the conversation?

MR. TOPKIS: I think the witness has told you.

MR. HRUSKA: Not quite.

MR. TOPKIS: What do you mean by the tenor?

Q Do you know what I mean by the tenor?

A There was no fireworks involved. There are things we have to face all the time in ASCAP and counsel is always reporting things to us for our

consideration and he asks for our recommendations or he makes a recommendation, either way, and we go from there.

There are many more important things that come up than the Minnesota Mining.

Q Do you recall whether your counsel-- by the way, by your counsel, I take it you mean Herman Finkelstein?

A Right.

Q Do you recall whether Mr. Finkelstein reported that Shapiro Bernstein and Leeds Music had licensed 3M?

A I don't recall the naming of firms. He may have. I don't recall that. But we were not excited about it because of the non-exclusivity of our agreement, I guess the people had a right to do that.

Q Do you remember whether Leon Brettler was at that meeting?

A I don't know.

The make-up of the composition of the meetings always differs.

Q Do you remember any particular person at that meeting other than Mr. Finkelstein?

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A I'm sure the president was there. I don't know what other members of the board were present. I haven't looked up the minutes of the meeting of that particular day to refresh my memory.

Q You don't remember any particular comment that was made at the meeting?

A Any comment?

Q Any particular comment, yes.

A I said there was a mild discussion of it, the substance of which I cannot give you in detail but there was a mild discussion.

Q Mild?

A Yes.

Q You are sure it was mild?

A Oh, yes.

Q Have there within your recollection been discussions at the ASCAP board meetings that were not mild?

A On what subject?

Q That were fairly heated, on any subject?

A Yes, there have been discussions that were not mild on other subjects.

Q Can you think of a particular subject that falls in the category?

A No.

Q A change in the ASCAP emblem?

A There was a big discussion on that.

Q That was a fairly heated discussion?

A The logo, yes. Mr. Kruska, through the years, things come up that are a little bit more than mild and I can't point out just what they are. There were so many.

Q But you are quite sure that the discussion concerning the direct licensing of 3M was a quite mild discussion?

A As I remember it. As I remember it there were no pyrotechnics or anything like that.

Q Nobody got excited?

A I don't remember anybody getting excited.

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Q Nobody directed questions to people at the meeting in a fairly heated way?

MR. TORKUS: I think we have heard heated, mild, excited, pyrotechnics. Enough. With all respect.

I will direct the witness not to answer.

Q How sure are you, Mr. Washington, that the discussion at this meeting regarding the direct licensing of 3M was in fact a mild discussion?

A The meeting that I attended where this was brought up was a fairly mild discussion. As I said, I don't attend every meeting. I live in California. I don't come in for every meeting. Whether there was any discussion at any other meetings, I don't know.

Q Is it possible in your mind that the meeting that you are thinking of was a meeting at which the second 3M tape, that is, the 1200 tape, was discussed rather than the--

A No, it was the first one.

Q And are you quite sure the meeting you have in mind was not a meeting concerning ASCAP's licensing of 3M?

A There may have been some questions in the

room as to why 3M had not approached ASCAP instead of the publishers but theywere just questions as to why.

Q Is it possible in your mind that the meeting that you attended was the second ASCAP board meeting rather than the first ASCAP board meeting at which the subject of the direct licensing of 3M was raised?

A It was the first meeting.

Q How are you so sure of that?

A Because from conversations I heard after the meeting, this was something they never heard of before.

Q With whom did you have those conversations?

A I don't remember. Different people come out of the room. 24 men come out of the room and they talk as they are walking down the hallway to the elevators.

Q Did anyone ever indicate toyou, anyone in the music business, every indicate to you that for one reason or another he was against the idea of music publishers licensing 3M directly?

A Didn't address it to me, no.

Q You have heard no criticism expressed--

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that?

A Oh, not in the last 20, 25 years. They have become oriented and conditioned to know that AGAC can help them too.

Q How does AGAC help a publisher?

A How do they help a publisher? I can't answer that. I am sure they do because the publishers seem very willing to do business with AGAC. I think it makes their bookkeeping problem much simpler, for one thing.

Q Are you aware of the fact that music publishers who sign the AGAC standard agreement are not authorized to license - I'm sorry -- are not authorized to issue bulk licenses to music in their catalogs?

A Yes.

Q Without AGAC's approval?

A Right.

Q Do you know the background of that provision, how that came into being?

A I can only state my personal experience. Some years ago a publisher who handles quite a number of my songs made a bulk deal with a studio in California, which I disapproved of and through the

years - there was a number of bulk deals made and we considered this very unfavorably.

Q In what sense, sir?

A Well, they make a bulk deal and if you broke it down, you would find out some of your best songs were being sold for $25. So AGAC, I think, eliminated that practice.

Q Do you recall the particular studio with whom a bulk deal was made encompassing your songs?

A Gosh, no. It is so many years ago. I remember the situation, though.

MR. TOPKIS: Just so the record can be clear, do you know when this was?

Q I was about to ask that.

Thank you.

Do you know when this bulk deal was made that you objected to?

A Way back in the thirties some time.

Q Have there been any bulk deals, to your knowledge, since then, involving any of your songs?

A Involving my songs?

Q Yes, sir.

A I don't know of any. There may have been.

Q Any others that you have heard about in

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Q No, no. Under the AGAC standard form of agreement, the publisher cannot license performance rights for television use without the writer's approval?

A You are specifically stating television?

Q Yes, sir.

A I believe that is in the contract. I'd have to see it in front of me to refresh my memory on it. I believe that is in the contract.

Q Do you recall the background of that provision?

A No, I do not. I was never privy to the council meetings of AGAC.

Q Have you ever had any discussions with anybody or has any information come to your attention which would indicate why that provision is in the AGAC standard form of agreement?

A No.

Q AGAC does not audit ASCAP, does it?

A Beg pardon?

Q I say AGAC does not audit ASCAP, does it?

A Not to my knowledge.

Q Do you think there is any need for AGAC to audit ASCAP?

A Absolutely none.

Q Why?

MR. TOPKIS: Oh, come. I object to that.

Q Well, AGAC audits publishers.

MR. TOPKIS: That's right.

Q And it does not audit ASCAP, is that right?

MR. TOPKIS: Arthur Young audits ASCAP.

Q Doyou know whether AGAC had any point of view with respect to music publishers directly licensing of 3M?

A I don't know. I never attended their council meetings so I don't know.

Q Did you ever hear anything about a letter which AGAC sent to the music publishers who licensed 3M directly?

A Licensed what?

Q Who licensed 3M directly.

A No. I did not know of such a letter.

Q Do you recall any discussion at an ASCAP board meeting regarding AGAC's participation in the 3M matter?

A No.

Q Do you recall whether Mr. Finkelstein or

anybody else within the ASCAP organization was authorized to take any course of action with respect to the direct licensing of 3M?

A No. He was not authorized that I remember to take any direct action. It was a period of waiting to see what would happen.

Q Are you a member of the CLGA which stands for the Composers and Lyricists Guild of America?

A Yes, I am.

Q How long have you been a member of that organization?

A The first six years that it was in existence I refused to join. Then I was-- it was made necessary for me to join a few years ago. How many years ago I don't know.

Q Why was it made necessary for you to join?

A I don't know how legitimate it was but they seem to have a closed shop in the Hollywood studios and CLGA is somewhat different than ASCAP which is a non-profit organization and AGAC, which is more of a protective organization. CLGA is a union and I didn't care to belong to any union. I didn't feel I needed a union to do business for me. But CLGA finally made

it necessary for me to join by notifying the studios that I was unemployable, at which point it was necessary for me to join.

Q Do you know who within the CLGA notified the studios to that effect?

A I don't remember whose signature was on the letter.

Q Ted Cain?

A It may have been. I don't remember whose name was on the letter.

Q Ted Cain is the executive director of the--

A I don't know if he always was but he is now.

Q I take it from what you said, you have not served on any CLGA committees --

A I was never present at but one meeting in all these years.

Q How did you hear that the CLGA had indicated to the studios that you were unemployable?

MR. TOPKIS: Excuse me. I can see no relevance to this line of inquiry. I couldn't care less about what happened between Mr. Washington, CLGA, and the studios.

If you want to suggest some relevance, I am

prepared to listen but I really don't see why we have to get into that area.

Q Is there any other organization of songwriters, to your knowledge?

A That I know of?

Q Yes.

A There may be other organizations but the only one I know of is -- specifically for songwriters and songwriters alone is AGAC in this country.

Q CLGA is an organization of writers who score motion pictures and television programs?

A And songwriters.

Q And songwriters.

A Composers, Lyricists Guild of America. Composers and lyricists. Composers of song and lyricists.

Q The only reason I asked that is because you had said that the only organization of songwriters you knew of was AGAC.

A I am talking about songwriters per se. All screen writers are not songwriters. Very few are, in fact.

Q When yousay screen writers, you mean to include --

A Background music.

Q For television as well?

A Or whatever.

Q Do you know whether AGAC has a position with respect to the ASCAP licensing system?

A ASCAP what?

Q Licensing system.

MR. KORMAN: I object to that.

MR. TOPKIS: What does that mean?

Q ASCAP licenses users for performance rights?

A Right.

Q Is there a position in the AGAC organization in favor or in disfavor of that fact?

A I don't know of any position.

Q Are you familiar with the Harry Fox operation?

A Vaguely.

Q Do you know that they operate as a clearing house for movie rights, mechanicals and television sync rights?

A Yes.

Q Do you recall when Fox got into the movie performance rights field?

A No, I don't. I don't recall when that was.

Q Do you recall when ASCAP got out of that field?

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Q In fact, some of them were quite unpleased about it?

A I would say so, yes. They didn't understand it more than anything else.

Q Would you be in favor of the Harvey Fox Agency taking over the function from ASCAP of licensing performance rights to television networks?

A If I would be in favor of that? Not at all.

Q Why not?

A Because I think ASCAP does an eminently great job and I think it is good for the writer, the publisher and for the users of music. I don't see -- it is a perfect world, I think, that way.

Q Have you ever become involved in any movie rights deals handled by Fox?

A Handled by Fox?

Q Yes. Cleared by Fox.

A I may have but without my knowledge.

Q I really mean direct participation.

A Not direct, no.

Q Have you ever talked to anybody at the Harry Fox Agency about the licensing of your music?

A No.

Q Do you know Miss Maribn Mingle?

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Q Do you think that is good from a songwriter's standpoint?

A My personal opinion?

Q Yes.

A Yes, I think that is good.

Q Why?

A Because I'm interested in my colleagues and my craft and I feel that this is the best shelter they could possibly have.

Q Shelter from what?

A Shelter from frustration, lack of incentive to write, loss of potentiality for what might be created in the future.

There are always a Stephen Schwartz or a Jerry Herman or -- what is this other fellow's name, Stephen Sondheim on the horizon all the time.

These people may not enter the profession if -- these songwriters might be discouraged from songwriting but for the fact they have some sort of organization to take care of their affairs.

They are not competent, I don't think, most of them, to take care of their affairs.

Q Don't they have business agents?

A The young fellow breaking into the business can't afford a business agent.

Q Let's take that young fellow breaking into the business.

Doesn't he have a better chance at having his music used if he can offer it at a lower price?

A Offer it at a lower price?

Q Right.

MR. TOPKIS: I think you have now arrived at the point where you are arguing with the witness.

MR. HRUSKA: I am just asking for the witness' opinion.

MR. TOPKIS: There is no bar in the world to any songwriter breaking into the business who wants to go out and offer his music at any price he wants.

MR. HRUSKA: Let's not have speeches.

MR. TOPKIS: Let's not ask misleading questions.

Any songwriter breaking into the business, I repeat, has the option of joining ASCAP or not joining ASCAP.

If he doesn't join ASCAP, he can do anything he wants with his music. If he does join ASCAP, he is still totally at liberty to do anything he wants with his music.

That being so, I respectfully submit that your question is misleading, and hence, is objectionable as to form.

I will direct the witness not to answer it.

MR. HRUSKA: Somehow that sounded more like an opening statement than an objection and I wish you would confine your objections to the question rather than making a speech which runs a fairly good risk of looking like coaching.

MR. TOPKIS: You know better than that.

BY MR. HRUSKA:

Q We have already established, I believe, Mr. Washington, that a songwriter would have no business brains unless he joined ASCAP or BMI.

A I didn't say that.

MR. TOPKIS: I direct the witness not to answer such nonsense.

A I didn't say that.

MR. TOPKIS: We all know you didn't, Mr. Washington, including the gentleman who just framed the question.

MR. HRUSKA: The record will show what you said.

MR. TOPKIS: Yes, it will. Well, reasonably.

MR. HRUSKA: We hope.

THE WITNESS: Can I go off the record for a minute?

MR. TOPKIS: I wish you wouldn't.

BY MR. HRUSKA:

Q Do you believe that a songwriter who has not yet become prominent would have a better chance to have his music used if he had the opportunity to price his music at a lower level?

MR. TOPKIS: Used where?

MR. KOMAN: Lower level than what?

MR. HRUSKA: We are getting very, very close, Mr. Koman, to going to the judge and insisting that we have one counsel at these depositions and not two or three.

MR. TOPKIS: Go ahead. Put your question. You won't have any problems.

MR. HRUSKA: The last question, Mr. Topkis, was used where, and we can assume for the purpose of this question, we are talking about a television network.

Q Do you believe that a songwriter who has not yet become prominent would have a better chance than he now has under the present ASCAP blanket licensing system to have his music used on network

television if he could offer it at a lower price?

MR. HOPKIS: Than whose price? With ASCAP having issued a blanket license to the networks or the network involved?

You will have to add a number of factors to your assumption before I think it can be reasonably answered.

MR. HRUSKA: I will be pleased to.

Q Let's compare the present system which you are familiar with with the system inwhich television networks have no ASCAP licenses --

A All television networks?

Q That's right. And we discussed before the present ASCAP distribution rate for a feature performance is approximate $800.

Do you believe that a songwriter who has not yet reached prominence would have a better chance in the system where the networks did not hold ASCAP licenses and he could offer his music at substantially less than $800 to have his music performed than he does under the present system?

MR. HOPKIS: And one final assumption. Do I take it that in this nirvana all other songwriters and publishers would be offering their music at whatever prices they saw fit?

MR. HRUSKA: That's right.

MR. TOPKIS: Okay.

A I think the songwriter would be crushed into extinction. I think the young songwriter you are talking about who did not establish himself probably would not last in the profession more than a year or two years, he would be frustrated and demoralized to the point where he wouldn't want to continue his career.

Q I honestly don't understand that.

Could you--

A You don't understand my answer?

Q I understand what you said but I wonder if you could say a little more about the reasons which lead you to that conclusion.

A Well, I don't think he could possibly have the business acumen nor the stamina to go with it to pursue this form of-- this kind of condition. I think he would just give up.

Q What do young songwriters do now to get their music performed?

MR. WILE: I object to the form of the question.

Q They don't form a relationship with a music publisher, for example?

A They are cut up so many ways that it is unbelievable.

Q When you say "cut up" --

A Cut up by business managers, they are cut up by attorneys, they're cut up by the record producers, they are cut up by disk jockeys, they are cut up by everybody they come in contact with.

Q The reason they form--

A Because they are weak. They can't fight.

Q But the reason they form relationships with these agents, et cetera --

A They think they are going to do them good but it doesn't turn out that way.

Q How would it differ in this system where the networks did not hold ASCAP licenses; that is really what I am getting at.

A I just explained how it would differ. I don't think they would go on with their profession.

Q Because therewould be less money available?

A Less money available for one thing. Another thing, I think they would be up against forces which they could not ever hope to combat or compete against.

A songwriter, he is really a frail person generally. He knows very little about business generally.

That doesn't apply to all songwriters. Some songwriters are eminently great businessmen but I would say the great majority would be the worst businessmen in the world.

Q Who are these forces that you mentioned?

A The managers, the producers of the records, the attorneys, the disk jockeys, everybody.

Q Do you think it is fair that you receive the same amount of distributions for a CBS Television Network use of any of your songs, irrespective of what song it is and irrespective of who performs it?

A Yes, I think it is fair.

Q Have you ever objected to that?

A No.

Q Have there been any discussions at ASCAP board meetings as to whether that system ought to be changed?

A That would be a subjective thing. You would have to be Solomon to decide which song is better. Every songwriter thinks his song is the greatest song in the world.

Q Have there been any discussions at any ASCAP board meetings that you attended regarding the per program form of license?

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definition of it.

Q I understand that. Just your impression now.

A I think I just answered that question.

Q Have you ever heard of any broadcaster that took a per-program license, ASCAP per-program license?

A I don't know of any personally, no.

Q Do you recall any discussions at any ASCAP board meeting regarding any broadcasters'or networks' request for a per-program license?

A That doesn't come into the board room. That comes into the licensing department and I may not hear about it at all.

Q Have you ever served on an ASCAP negotiating committee?

A Once.

Q When was that?

A I was trying to remember the year. I can't remember the year but it was-- it seems like some ten years ago. That would bring me back to 1962 or 1963.

Q Can you remember anything about the experience at all?

A It was grueling.

Q With whom were you negotiating?

A With the CBS, ABC and NBC attorneys. We were

there until the early hours of the morning.

Q Do you remember what you were negotiating?

A A new contract. Which one I forget right now.

Q Would this have been 1964?

A As I say, it could be. I don't know which--just what year it was.

Q And did the ASCAP negotiating committee caucus from time to time to consider various points that had been raised during the course of the negotiations?

A So did the other side. They caucused, we both caucused at different times. In fact, we broke and went and had some tea and came back and continued negotiations.

Q Was there discussion among the negotiating committee regarding the fee that would be offered by ASCAP to the networks?

A Yes, that was a discussion.

Q Do you remember who else was in attendance -

A Who was what?

Q Who else was in attendance --

A The only name that occurs to me on the opposite side of the table was a man named Stabile.

Q No, I mean on your side of the table.

MR. TOPKIS: In attendance when and where?

At some particular caucus, at some particular negotiating meeting, or what?

Q At some particular negotiating meeting, namely, the meeting that Mr. Washington has referred to.

MR. TOPKIS: I didn't think he referred to one. I thought he referred to being on a negotiating committee that met from time to time.

THE WITNESS: Oh, no. We talked among ourselves and then we met with the attorneys.

MR. TOPKIS: Once?

THE WITNESS: One night as I remember.

MR.HRUSKA: Are you back with us? I think you missed the last five questions and answers.

Q Who else from ASCAP was there?

A Herman Finkelstein. Stanley Adams. A publisher, I forget which publisher. And myself. I think there were four of us. And there was three attorneys for the networks, as I recall. This is a long time ago.

Q I understand.

Do you recall what the considerations were on the basis of which ASCAP made its final offer to the television networks?

MR. TOPKIS: Was there a final offer made?

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MR. HRUSKA: Yes, there was a deal that night.

MR. TOPKIS: But who made the proposal? That hasn't been established as yet.

MR.HRUSKA: There was a proposal ASCAP made.

Q Do you remember that?

A I don't remember the figures exactly but I know there was a point of discussion about 2.0 or 1.9. I forget the exact figures now.

Q The precise question is, do you remember the considerations which led ASCAP to make its proposal?

A Well, the networks, as I remember it, and it is very vague in my mind now after these years, but the networks wanted a reduction in rates. ASCAP didn't want to give a reduction in rates so they compromised and it turned out very well, very friendly.

Q Was there any discussion among the ASCAP group as to how much the networks could afford to pay?

A Could afford to pay?

Q Yes.

A No.

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A Should or should not?

Q Right. Yes, either way.

A I would say there was more of a feeling we would rather not.

Q Did anybody express a reason why you would rather not?

A I don't remember.

Q Have you ever had any discussions about this lawsuit other than at an ASCAP meeting?

A You have to be more explicit when you ask me a question-- discussions with whom?

Q Well, let me attack it from this standpoint. Discussions with anyone other than Mr. Topkis or other members or associates in the Paul Weiss firm, or Mr. Korman. In other words, I am excluding the work you did with your lawyers in preparation for this deposition. Apart from that work, have you had any discussions regarding this lawsuit?

A I have had discussions with other songwriters.

Q Right.

A When they would ask me as a member of the board what was going on, what was this, and I would try to calm them and say "Don't worry, we have had these things come up during the years, and we have

always worked them out amicably, I'm sure this will work out.

Q Can you tell me the names of the songwriters with whom you had--

A No, I couldn't. Just generally. After all, there are 17,000 members of ASCAP.

Q 20,000, sir.

A Writer members. So if you asked me which ones I talked to, they talk to me, they asked me questions. As I say, I try to keep them from pushing the panic button.

Q Have you discussed the lawsuit with any publishers?

A No, I don't think so.

Q Can you recall the substance of any discussion that you have had about this lawsuit either at an ASCAP meeting or outside of it, beyond which you have already described?

A No.

Q Can you recall anybody at an ASCAP board meeting other than Mr. Finkelstein -- strike that.

Let me put it this way: Can you recall the substance of any statement made by anyone at an ASCAP board meeting other than Mr. Finkelstein concerning

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particular uses distinctly less desirable substitutes?

A I would say that would apply to almost all cases. Certain songs are more desirable than others in certain situations.

Q And there are a body of compositions which are relatively substitutable?

A Relativaely but not-- it would be a great watering down process, let's say. It would be a weakening process for the user of the music, I believe. My opinion you are asking for?

Q Yes.

Have there ever been discussions at ASCAP board meetings which you attended concerning the concept of licensing music on a use basis, by which I mean to say charging the user of music so many dollars and cents for each use?

A I think counsel has suggested that was what CBS had in mind but there hasn't been any long discussions about it. We haven't come near that point yet.

Q Do you have a point of view regarding that concept?

A I have a point of view based upon my 45 years as a writer.

Q Yes, sir.

A That it would not be a comfortable thing, I'll say, for me.

Q Why is that, sir?

A I am not used to this kind of world. It is like landing on Mars. You'd say "How are we going to live there?"

Q Has there been any discussion at any ASCAP board meeting that you have attended regarding the subject of price competition?

A Not that I remember.

Q Can you recall any discussions that you had with people in the music business regarding the subject of price competition?

A Not that I remember.

Q Have you given any thought or participated in any conversation or discussion concerning the administration of a per-program license?

A Have I given it any thought?

Q Yes, sir.

A To the administration of a per-program license?

Q Right. From ASCAP's standpoint, let's say.

A I know it is part of our way of doing

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A It didn't seem to me that they would attempt to.

Q Are you aware that NBC stated to the Court and to ASCAP that it was the NBC plan to attempt to license music not included in the 200 songs directly from the copyright proprietors of those songs?

A I did not know this.

Q Would that change your attitude about the desirability of ASCAP granting NBC such a license?

A No, it would not change my feeling about the desirability.

Q Why is that, sir?

A As I stated before, it would be a clumsy, difficult way of administering the affairs of song-writers. It would be prejudicial to certain song-writers and I think it would be a disservice to the American public who has an interest as well and I think it would be very difficult for NBC to operate that way.

Q What category of songwriters do you think would suffer under this sort of system?

A The ones who are not represented in that list.

Q Even if they had the opportunity to license NBC directly?

A I didn't know this.

Q That is why I asked before whether this part of it changed--

A I don't think it would change my opinion as to the awkwardness and clumsiness of the whole idea.

I don't think it would work well for the writer or the user of the music.

Q What I am trying to get at is why it wouldn't work well for the writer?

A For one reason, I don't think the writer generally-- I am not speaking specifically -- I don't think the writer generally has a business acumen that CBS or NBC may have in negotiating a deal.

Q But he could leave this to his publisher, couldn't he?

A I don't think he would like to do that.

Q Why is that, sir?

A A writer is his own man. A publisher is his publisher. In fact without songs, a publisher is just a factory with nothing to manufacture.

Q And is not his ASCAP?

A Is what?

Q And the publisher is not his ASCAP?

MR. TOPKIS: I don't understand that question.

Q The writer is content to have ASCAP license his music but is not content to have the publisher license his music?

A He would rather have ASCAP, put it that way.

Q What I am trying to understand is why.

A Because they have done an eminently fine service for the songwriter all through the years as they have for the users of music. It is a very good arrangement, I think, all the way through.

Q The writer would not trust the publisher--

A The word "trust" is not --

Q Let me finish the question.

-- would not trust the publisher to perform that service as well as ASCAP performs it?

A Well, are you asking me or are you asking my opinion of all other writers?

Q I am asking for your opinion regarding the likely attitudes of the writers you know.

MR. TOPKIS: Oh, no. I will not let the

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witness mind-read writers he knows.

You may ask him what his opinion is.

Q What is your opinion?

A I think they would be very unhappy.

Q Have there been any discussions at ASCAP board meetings that you have attended other than the discussion you described yesterday regarding the licensing of 3M?

A I think I covered that whole thing as far as my memory serves me.

Q Your memory may be better than mine. My impression at the moment is that you discussed one ASCAP board meeting at which it was announced by counsel that some ASCAP publishers had licensed 3M directly.

My question is do you recall any discussions at an ASCAP board meeting regarding the subject of licensing 3M which took place after that first discussion?

A There may have been but I can't be perfectly sure in my mind.

Q Could you bring back the substance of any such conversation?

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MR. TOPKIS: We never had an opportunity to have a board meeting to consider the subject.

MR. HRUSKA: That is interesting news.

Q Have there been any discussions at an ASCAP board meeting or otherwise in which you participated concerning what might be done in the event that the CBS Television Network obtained a per-use license?

A No. Not to my-- not that I recall.

Q What do you think would be the major developments in the music business in the event that the CBS Television Network obtained the sort of per-use license which I described?

A You know, I am quite confused by the fact that you are constantly asking me to speculate on something which I would have no way of knowing.

Q Having been in the business as long as you have been, Mr. Washington--

A I have been in the business a long time but I have operated always in the same way for 45 years and it is my world that way.

Q Are you aware of the fact that a songwriter cannot become a member of ASCAP unless he authorizes ASCAP to grant small performance rights to all of his

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EXCERPTS FROM THE DEPOSITION OF PHILIP B. WATTENBERG

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

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72 Civ. 5740

DEPOSITION OF PHILIP B. WATTENBERG, taken by plaintiff, pursuant to subpoena at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, N.Y., on March 15, 1973, before Howard Chaon, a shorthand reporter and Notary Public of the State of New York.

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SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. [illegible]

APPEARANCES:

Messrs. CRAVATH, SWAINE & MOORE
Attorneys for plaintiff,
One Chase Manhattan Plaza,
New York, N.Y.
BY: ROBERT K. BAKER, Esq., of Counsel.
J. BARCLAY COLLINS, Esq., of Counsel.

Messrs. PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for defendant ASCAP
345 Park Ave.,
New York, N.Y.
BY: ALLAN BLUMSTEIN, Esq., of Counsel.

Messrs. HUGHES, HUBBARD & REED,
Attorneys for defendant Broadcase Music, Inc.,
et al.,
One W 1 Street
New York, N.Y.
BY: RICHARD WILE, Esq., of Counsel.

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IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the within deposition may be signed before any officer authorized to administer an oath.

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PHILIP B. WATTENBERG, having been duly sworn, testified as follows:

EXAMINATION BY MR. BAKER:

Q Will you state your name for the record?

A Philip B. Wattenberg.

Q Where do you reside?

A 50 Sutton Place South, New York, 10022.

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increased significantly since that time?

A Yes.

Q I take it that you would agree with the statement which I will show you in a minute:

"The sales of sheet music which were the mainstay of the industry have diminished hugely. A hit ordinarily sold over a million copies" -- referring to sheet music -- "now a sale of a hundred thousand copies of a new song is rare."

A Sounds like something I wrote.

Q "The growth of sales of records has been a contributing cause to the decline in sales of sheet music."

Would you agree with that statement?

A Yes.

Q Could you tell me, do you know a Mr. M. E. Richetts?

A I did, indeed.

Q Mr. Richetts no longer is with us?

A No.

Q When did he pass away?

A It was in 1972, I believe.

Q Could you tell me by whom was Mr. Richetts employed during the last 12 years?

A Chappell, Ltd.

Q Do you know what position he held there?

A He was the -- I believe they call it managing director.

Q What was his connection, if any, with Chappell, Inc.?

A That's hard to say.

Q Did he have any managerial responsibilities with respect to the operations of Chappell, Inc.?

A For a short period.

Q When was that period?

A Between 1964 and 1967.

Q Would you describe breifly the nature of those responsibilities.

A The background is this: the Dreyfus brothers operated the two companies; one in London and one in New York. Louis Dreyfus was in London, Max Dreyfus was in New York.

Mr. Richetts was based in London as the managing director of Chappell London under Louis Dreyfus.

In the course of his work he traveled to the United States at least once a year and stayed for a short period for the purpose of contacting the American publishers represented by Chappell Ltd. o:

London. He had no function as far as Chappell New York is concerned. That was run by Max Dreyfus, who died in May, 1964 at the age of approximately 90, give or take a few years.

During the last year or two of his live he functioned less frequently than in previous years.

Then there was a managing vacuum. When he died Louis Dreyfus undertook with Mr. Richetts to manage both New York and London, and they alternated in coming over here. I don't remember if Mr. Richetts was ever made an officer of Chappell, Inc. I am inclined to believe he wasn't.

He had a directive from Louis Dreyfus to do what he wanted to do when he got here.

Q For how long a period of time did he have this authority?

A Well, Louis Dreyfus died May 4, 1967, and after that the two estates of the Dreyfus brothers became involved in the management, and Mr. Richetts was more restricted because he did not see eye to eye with the executor of Louis Dreyfus' estate; and one of the executors of Max Dreyfus' estate was made general manager of Chappell, Inc.

Q When did that occur?

A Sometime after May 4, 1967.

Q Within a year?

A Oh, yes.

Q Do you recall the name of the director of Max Dreyfus' estate who was made executor?

A It was David Oppenheim.

Q Had Oppenheim previously been in the [illegible] business?

A No.

Q Was he a citizen of the United States, do you know?

A Yes. He practised in Bronxville.

Q A lawyer?

A Yes.

Q Do you know whether he is still practising in Bronxville?

A The last I heard, he was.

Q Would you identify the executor of Louis Dreyfus' estate with whom Mr. Richetts did not see eye to eye?

A The executor of the estate was a fellow named Norrall.

Q Was he a citizen of the United States?

A Yes.

Q In late '64 or early '65 did you know whether the Minnesota Mining and Manufacturing Corporation, 3M, approached Chappell and Company for the purpose of obtaining a license to certain compositions in their catalog which would enable them to have some of those compositions performed via a bachground music service which they proposed to market?

A Yes.

Q How didyou become aware of that? Did Mr. Richetts tell you?

A I believe that Mr. Allen Arrow called me.

Q Do you recall approximately when that was?

A Sometime in 1964.

Q Had you known Mr. Arrow previous to the time he called you?

A Yes.

Q You had had dealings with him previously?

A Yes.

Q Do you recall the substance of the first conversation you had with Mr. Arrow?

A I believe he described the new business that 3M was going into, and explained what he was doing in it.

doing in it.

Q Did he tell you why he was calling you?

A Yes. He said he was talking to a lot of publishers about getting these rights.

Q Did he tell you that he had previously had discussions withMr. Richetts?

A I don't believe so, but I wouldn't swear to it.

Q Did he indicate to you why he had called you and not someone else at Chappell?

A Well, he didn't indicate, but as I said before, there was a management vacuum.

Q And he knew you and so he thought he would talk to you?

A That's right.

Q Do you recall what you said to Mr. Arrow during that conversation?

A Not exactly.

Q Do you recall in substance what you said to Mr. Arrow?

A I probably said, "That's interesting, and I will tell my people."

Q To whom are you referring when you say "tell your people?" Obviously Chappell, but whom at Chappell?

A As I said before, it was hard to know to whom to tell anything to.

Q Let's go at it a different way. With whom did you discuss during the period 1964 through 1968, to the extent there were discussion, with whom did you discuss at Chappell the 3M proposal?

A It would have been Mr. richetts.

Q Anyone else?

A I don't think so.

Q Do you recall whether Mr. Arrow mentioned to you that had previously attempted to negotiate a performance rights arrangement wiht ASCAP for this project?

A He may have said that.

Q Do you recall anything at this time concerning the terms of the offer which 3M was prepared to make to Chappell?

A The original offer was I believe 5 cents a composition.

Q 5 cents per composition per tape sold?

A Yes.

Q Do you recall any of the other terms of the proposal?

A 5 cents was supposed to be two cents mechanical and one cent a year for performing rights

for three years.

Q One cent a year for three years?

A Yes.

MR. BAKER: Let me ask the reporter to mark as plaintiff's exhibit 171 a copy of a letter from Allan Arrow to Mr. Wattenberg dated December 4, 1964, attached to which is a copy of a letter from Mr. Lindgren, to Mr. Richetts dated November 27, 1964.

(Plaintiff's exhibit 171 marked for identification.)

MR. BAKER: I'd like to hand it to the witness and I will state now that that is for the purpose of refreshing his recollection as to any discussions he may have had during that period.

Q Do you recall knowing Mr. Frank Rogers at that time?

A Yes.

Q Who is he?

A Frank Rogers was the understudy of Mr. Richetts.

Q The understudy for all purposes for for managing Chappell, Inc.?

A No; Chappell,Ltd had depth in their management and he was next in line to take over

management when Mr. Richetts died. Unfortunately, he died first.

Q Now, this plaintiff's exhibit 171 which has been marked, does this refresh your recollection with respect to the substance of the conversations you may have had with Allan Arrow prior to the time you received this letter?

A Yes.

Q Would you elaborate on this conversation further?

A I don't recall having any extended conversations with Allan Arrow at all.

Q Any other representative of the 3M Corporation?

A No.

Q Mr. Orenstein?

A Possibly, but I don't recall any.

Q What about Mr. Lindgren?

A I can't recall talking to Mr. Lindgren.

Q Do you recall whether you requested a copy of the proposed contract which 3M was willing to enter into with Chappel?

A I think I did.

Q Do you recall discussing with Mr. Richetts

whether from a business point of view it would be desirable for Chappell, Inc. to enter into suchan agreement?

MR. BLUMSTEIN: May I have the question read back, please.

(Question read.)

MR. BLUMSTEIN: I want to caution the witness that you are being asked about business discussions you may have had with Mr. Richetts, not about any communications you may have had with him in your capacity as counsel.

You may answer the question.

A To the best of my recollection Mr. Richetts was in London, and I did not talk to him on the telephone. So I couldn't have had any discussions with him.

Q I take it from that statement that you were in New York?

A I was always in New York.

Q Did you ever have any discussions with Mr. Arrow regarding whether itwas desirable from a business point of view or otherwise for Chappell to enter into an agreement of this sort?

A I have to explain. I was just a lawyer,

and my function was to pass on information that came to me firsthand, but I never made decisions. I was not in a position to influence other than perhaps giving a legal opinion now and then.

Whatever I said to Mr. Arrow didn't mean anything.

Q Do you recall whether you did say anything to Mr. Arrow?

A I don't recall.

MR. BAKER: I would like to askthe reporter to mark as plaintiff's exhibit 172 for identification a copy of a copy of a letter which appears to be from Allan Arrow to Mr. Wattenberg, dated December 3, 1964, and attached to it is an unexecuted proposed agreement of 21 numbered paragraphs in length, and 9 pages in length.

(Plaintiff's exhibit 172 marked for identification.)

Q Do you recall receiving the original of this letter?

A Yes.

Q Do you believe that this was the contract which Mr. Arrow forwarded to you, the proposed contract?

A Yes.

Q Now, prior to requesting a copy of this contract do you recall either conversations or correspondence with Mr. Richetts regarding this proposal?

A I believe I wrote Mr. Richetts reporting the information I had received from Mr. Arrow.

Q Now, you have previously testified that during this period there was a management vacuum at Chappel & Company, and I think that your prior testimony regarding your career as a lawyer indicated that you were at least knowledgable about the music publishing business in this country.

I think you have also testified that Mr. Richetts was just then becoming involved with the operations of Chappell, Inc. to the extent they did not relate to the relations of Chappell, Itd. with American publishing companies in connection with Chappell, Ltd. representation of them abroad.

At any time during late '64 or the first 6 months of '65 did Mr. Richetts ever ask you for your opinion of whether it was in Chappell, Inc.'s best interest to proceed with attempting to seriously negotiate this proposal?

A I don't remember Mr. richetts ever asking

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me such a question about anything.

Q Anyone else at Chappell?

A No.

Q Now, referring back to plaintiff's exhibit 171 for identification, do you recall whether there was any discussion of the number of songs which the 3M Corporation woulduse in its first series of tapes?

MR. BLUMSTEIN: Chappell tapes.

MR. BAKER: Yes.

A Yes. I believe that that was among the information that Arrow gave me.

Q Do you recall whether itwas 200 songs?

A I believe it was.

Q Do you recall whether Mr. Arrow was prepared to offer Chappell a guarantee as to the amount of revenue which would be generated during each year under this agreement?

A I remember a one-payment guarantee, yes.

Q A one-payment guarantee. Could you elaborate on your recollection there?

A Well, my recollection is that upon the signing of the agreement there would be one payment as a guarantee and that would be it.

Q Was it also your understanding that once the

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probably received it, but I can't identify this as to ring any bell at all.

Q Did you have occasion to discuss this proposal with any employee of Chappell, Inc. or Chappell, Ltd.

MR. BLUMSTEIN: Which proposal are you now referring to?

MR. BAKER: The proposal referring to licensing of mechanical rights to the 3M Corporation in or around 1968.

A I probably discussed it with David Oppenheim.

Q Do you recall whether you discussed it with Mr. Richetts?

A No, I don't.

Q Did Mr. Richetts ever suggest to you other than in the course of seeking legal advice that if Chappell, Inc. had entered into an agreement with the 3M Corporation for the licensing of performance rights that it would have been in trouble with ASCAP?

A You say did he ever tell me that?

MR. BAKER: Read the question back.

(Question read.)

A I don't remember whether he did or not.

Q Did anyone from Chappell, Inc. or Chappell, Ltd. indicate to you the view that if Chappell, Inc. or Chappell, Ltd. had licensed 3M directly they would have been in trouble with ASCSP?

MR. BLUMSTEIN: Other than in the course of seeking legal advice?

MR. BAKER: Yes.

A The statement is so meaningless that I can't remember anyone ever saying it or ever suggesting it.

Q Why is the statement meaningless?

A You don't get in trouble with ASCAP.

Q Was Mr. Richetts the sort of a man who was easily intimidated?

A No.

Q Was Mr. Richetts a man who was in the ba habit of making meaningless statements?

A Meaningless?

Q Yes.

A He was in the habit of exaggerating, particularly in his later years.

Q Have you ever served as a memb er of the board of any trade associations?

A No.

Q Officer, other than counsel?

A No.

Q Do you recall any discussions which you may have had, again, other than in shte course of giving legal advice, with publishers or their representatives regarding the direct licensing of the 3M Corporation by U. S. publishers?

A Yes.

Q With whom did you discuss that?

A I recall discussing it with Leon Brattler of Shapiro, Bernstein.

Q Approximately when did that discussion take place?

A At the beginning of the whole thing.

Q Where did the discussion take place?

A On the telephone.

Q Do you recall the substance of that discussion?

A I merely wanted to know what he was doing about 3M.

Q What did he tell you?

A I recollect that he said that he was licensing them and some of the other publishers were.

Q Did he discuss with you at all the terms

of the agreement he was negotiating with 3M?

A He probably gave me an outline of the terms which were in the first proposal given to Chappell, except for the guarantee which would have differed.

Q Do you recall anything else that he said in connection with this?

A No.

Q Did you talk to anyone else?

A I am not sure.

Q You may have, you may not have?

A That's right.

Q Did you call Mr. Brattler or did he call you?

A No, I called him.

Q Did you ever discuss the direct licensing of 3M with any officer of a trade association in connection with the music publishing business?

A I don't remember any discussion with any officer of any trade association on the subject.

Q Did you ever have any discussions with any representatives from AGAC?

A No.

Q Other than the licensing of performance rights by certain publishers to 3M and the licensing of performance rights to producers of theatrical

***

Q Do you recall any of the figures or terms which Mr. Korman related to you regarding their licensing agreement with Muzak or other background music services?

A No, I don't.

Q During your association with Chappell other than in the course of giving legal advice do you recall whether any representative of Chappell, Inc. or Chappell, Ltd. ever expressed to you the view that performing rights were best administered through performing rights societies?

A Not in so many words, but probably a number of times.

Q Do you recall any occasion on which that view was expressed to you in substance?

A Not in words, but by actions. Max Dreyfus was one of the stalwarts of ASCAP.

Q What actions led you to believe this?

A Well, he was a director and took his directorship very seriously.

Q Did Mr. Richetts share this view?

A Mr. Richetts was a director of PRS, which is --

Q Performance Rights Society of Great Britain?

A That's right. He took his directorship very

seriously.

Q He believed that it was inthe best interests of Chappell, Itd. to license through PRS?

A Yes.

Q Did he believe that it was in the best interests of Chappell, Inc. to license throught ASCAP?

A I am quite sure he did.

Q Did Mr. Richetts express the view to you that he believed Chappell, Inc. had lost a good deal of money by failing to enter into a direct licensing agreement with 3M in early 1964?

A I don't remember any such statement.

Q You say you don't remember any such statement. Do you remember any discussion with him or a statement by him which conveyed that substance?

A No.

Q Do you know whether Chappell, Inc. during the period 1968 through 1972 entered into an agreement with the 3M Corporation to license mechanical rights to works in the Chappell catalog?

A That would not be in my ken.

Q You mean that would be something you would not be involved in, so you wouldn't know one way or the other?

A That's right.

Q Who would have been involved in that?

A The licensing department of Chappell.

Q Do you know who at the licensing department of Chappell?

A The man in charge of the department is a fellow named Philip Mahfouz.

Q Do you know whether in the normal course of business that license would have been transacted throught the Harry Fox Agency?

A Well, Chappell does its own licensing.

Q It does not use the Harry Fox Agency?

A It uses it for collections.

MR. BAKER: That is all.

(Time noted: 12:30 P.M.)

Subscribed and sworn to before me

this day of 1973.

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EXCERPTS FROM THE DEPOSITION OF ROBERT D. WOOD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, Inc.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, et al.,

Defendants.

----------X

DEPOSITION of ROBERT D. WOOD, taken before Isadore S. Borak, C.S.R., Notary Public of the State of New York, held at the offices of Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., 345 Park Avenue, New York, New York, on the 11th day of January, 1973, at 9:30 a.m., pursuant to Notice and Stipulation of Adjournment.

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150 Nassau Street
New York, New York 10038
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ALSO PRESENT:

FRED HEATHER

ROBERT SONDAK

-ooo-

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the within deposition may be signed and sworn to before any Notary Public with the same force and effect as if signed and sworn to before the Court.

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R O B E R T D. W O O D, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION

BY MR. BLUMSTEIN:

Q What is your name and address?

A Robert D. Wood, Greenwich Country Club, Greenwich, Connecticut.

Q Mr. Wood, you are currently president of the Columbia Television Network; is that correct?

A Correct.

Q And you have been president since February 17, 1969?

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the question. Under what circumstances?

MR. BLUMSTEIN: Under the circumstances that I have previously set forth: CBS cancels its ASCAP licenses and NBC and ABC continue to have ASCAP licenses.

A That is illusory.

Q Why?

A Because it isn't going to work.

Q Why isn't it going to work?

A The reason it isn't going to work in my opinion is that our needs for music are so broad and so ongoing and so demanding and that while that need is of such magnitude, the people who can supply the music are strewn all over the countryside, there is no present selling machinery that could bring about the acquisition of music if we were to try to do it independently with any present arrangement with BMI or ASCAP. And in my opinion the publishers and most certainly the writers would be so disinclined to want to do business on that basis that we would end up with an empty bag, and as you have stated, NBC and ABC were to stay with their present arrangement, our programs would be disadvantaged; we would suffer tremendously from a competitive point of view. I don't think it would be very long before the viewers would perceive the

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second-class appearance of our programming and when that happened it is quite likely that we would drop in the number of homes that our programming, that our gross circulation would drop substantially; when that happened sales decline would follow and as that happened, obviously, your profits are going to be negatively affected.

But more importantly, I suppose, if we tried to force this unreal situation into being it would have failure written all over it and it wouldn't be very long before every program producer and program supplier would attempt to avoid CBS because the creative environment of our Network would be bush league compared to NBC and ABC. We simply could not consider that as responsible business people.

Q You spoke about the magnitude of your need for music on the Television Network. To your knowledge has anyone at the Network made any studies or evaluations of the magnitude of that need?

A I am not aware of any such studies.

MR. HRUSKA: Again you are talking about written studies?

MR. BLUMSTEIN: Yes, I am talking about written studies.

Q Do you anticipate or do you envisage that

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